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TELLING STORIES ABOUT WOMEN AND WORK: JUDICIAL INTERPRETATIONS OF SEX SEGREGATION IN THE WORKPLACE IN TITLE VII CASES RAISING THE LACK OF INTEREST ARGUMENT

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ARTICLE

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IN THE WORKPLACE IN TITLE VII CASES RAISING
THE LACK OF INTEREST ARGUMENT*Vicki Schultz**

Twenty-five years after title VII prohibited sex discrimination in employment, most women continue to work in low-paying, low-status, traditionally female jobs. Employers have avoided liability for sex segregation by arguing that women lack interest in more highly rewarded nontraditional jobs. In this analysis of title VII decisions addressing the lack of interest argument, Professor Schultz contends that courts have failed to recognize the role of employers in shaping women's work aspirations. Courts attribute sex segregation either to women's choice or to employer coercion. Both these explanations, however, incorrectly assume that women form stable preferences for traditional or nontraditional jobs before they begin working. Sociological research confirms that women develop their job preferences instead in response to changing structural and cultural features of work organizations. Professor Schultz draws on this research to propose a new way of understanding sex segregation that will enable courts to fulfill title VII's unrealized promise to working women.

I. INTRODUCTION

How do we make sense of that most basic feature of the world of work, sex segregation on the job? That it exists is part of our

* Assistant Professor of Law, University of Wisconsin. Although it is not traditional to do so in a scholarly article, I wish to express my gratitude to my mother and father, who have worked hard in sometimes unrewarding jobs to give me opportunities they never had. In keeping with my argument in this Article, I acknowledge also the powerful influence of the women and men with whom I have had the good fortune of working in my formative years as a scholar and lawyer. My appreciation goes to my colleagues at the University of Wisconsin, where a culture of support for intellectually ambitious scholarship still thrives. I am particularly indebted to Dirk Hartog, David Trubek, Martha Fineman, Neil Komesar, Carin Clauss, Jim Jones, and Bill Clune, whose unfailing faith, constructive commentary, and inspiring example have sustained me throughout this project. I have been blessed also with talented research assistants from the Law School and the Sociology Department, including Kate Kruse Livermore, Sue Bonitz, Lisa Serebin, Cate Snow, Lucy Brown, Amy Scarr, Stephen Petterson, Paula Lantz, and Julia Adams. I appreciate, in addition, the thoughtful comments of Paul Burstein and Peter Siegelman. Finally, I thank my former colleagues at the United States Department of Justice, Civil Rights Division, especially David L. Rose, for teaching me what people can make of title VII through their collective vision and labor. Support for my research was provided by the University of Wisconsin Law School and Graduate School and by the Smongeski Bequest administered by the University of Wisconsin Foundation.

common understanding. Social science research has documented, and casual observation confirmed, that men work mostly with men, doing "men's work," and women work mostly with women, doing "women's work."¹ We know also the serious negative consequences segregation has for women workers. Work traditionally done by women has lower wages, less status, and fewer opportunities for advancement than work done by men.² Despite this shared knowledge, however, we remain deeply divided in our attitudes toward sex segregation on the job. What divides us is how we interpret this reality, the stories we tell about its origins and meaning. Why does sex segregation on the job exist? Who is responsible for it? Is it an injustice, or an inevitability?

¹ Although the degree of sex segregation declined modestly during the 1970's, work remains highly segregated by sex. Throughout the 1980's, for example, roughly 60% of all men and women workers would have been required to switch to occupations atypical for their sex to achieve sex integrated occupations. See, e.g., J. JACOBS, *REVOLVING DOORS: SEX SEGREGATION AND WOMEN'S CAREERS* 20, 28-29 (1989); Beller, *Trends in Occupational Segregation by Sex and Race 1960-1981*, in *SEX SEGREGATION IN THE WORKPLACE: TRENDS, EXPLANATIONS, REMEDIES II* (B. Reskin ed. 1984) [hereinafter *SEX SEGREGATION IN THE WORKPLACE*]. As recently as 1985, over two-thirds of working women were employed in occupations in which at least 70% of the workers were female. See Jacobs, *Long-Term Trends in Occupational Segregation by Sex*, 95 AM. J. SOC. 160, 160 (1989). These estimates of occupational segregation understate the degree of sex segregation, because even workers employed in apparently sex-neutral occupations often work in industries, firms, departments, and jobs that are highly segregated by sex. See, e.g., Bielby & Baron, *A Woman's Place Is with Other Women: Sex Segregation Within Organizations*, in *SEX SEGREGATION IN THE WORKPLACE*, *supra*, at 27, 35 (finding that in a random sample of 393 California firms, 90% of the workers were in job titles to which only one sex was assigned); Gutek & Morasch, *Sex-Ratios, Sex-Role Spillover, and Sexual Harassment of Women at Work*, J. SOC. ISSUES, Winter 1982, at 55, 61-62 (finding that in a representative sample of 1232 Los Angeles workers, 42% of the women in male-dominated occupations were nonetheless in female-dominated jobs). For general discussions of sex segregation at work, see B. BERGMANN, *THE ECONOMIC EMERGENCE OF WOMEN* (1986); P. ENGLAND & G. FARKAS, *HOUSEHOLDS, EMPLOYMENT, AND GENDER: A SOCIAL, ECONOMIC, AND DEMOGRAPHIC VIEW* 121-96 (1986); J. JACOBS, *supra*; *WOMEN'S WORK, MEN'S WORK: SEX SEGREGATION ON THE JOB* (B. Reskin & H. Hartmann eds. 1986) [hereinafter *WOMEN'S WORK, MEN'S WORK*].

² The most serious problem associated with segregation is its effect on women's earning power. A substantial portion of the male-female wage disparity is attributable to women's concentration in lower-paying, female-dominated occupations and jobs. See, e.g., BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, *CURRENT POPULATION REPORT, HOUSEHOLD ECONOMIC STUDIES, SERIES P-70, NO. 10, MALE-FEMALE DIFFERENCES IN WORK EXPERIENCE, OCCUPATION, AND EARNINGS*: 1984, at 9-10 (1987); *WOMEN, WORK AND WAGES: EQUAL PAY FOR JOBS OF EQUAL VALUE* 33-38 (D. Treiman & H. Hartmann eds. 1981). Entry-level female jobs are often on short mobility ladders that offer little or no opportunity for advancement, see *infra* note 317, and the jobs women do tend to have less prestige than the jobs men do. Even when women work in male-dominated jobs, segregation creates a context in which they are perceived to have significantly less prestige than their male counterparts. See, e.g., Powell & Jacobs, *Gender Differences in the Evaluation of Prestige*, 25 SOC. Q. 173 (1984). For a discussion of these and other negative consequences of sex segregation for working women, see *WOMEN'S WORK, MEN'S WORK*, *supra* note 1, at 9-17.

In *EEOC v. Sears, Roebuck & Co.*,³ the district court interpreted sex segregation as the expression of women's own choice. The Equal Employment Opportunity Commission (EEOC) sued Sears under title VII of the Civil Rights Act of 1964.⁴ The EEOC claimed that Sears had engaged in sex discrimination in hiring and promotion into commission sales jobs, reserving these jobs mostly for men while relegating women to much lower-paying noncommission sales jobs.⁵ Like most employment discrimination plaintiffs, the EEOC relied heavily on statistical evidence to prove its claims. The EEOC's statistical studies showed that Sears had significantly underhired women sales applicants for the more lucrative commission sales positions,⁶ even after controlling for potential sex differences in qualifications.⁷

Although the statistical evidence exposed a long-standing pattern of sex segregation in Sears' salesforce, the judge refused to attribute this pattern to sex discrimination. The judge concluded that the EEOC's statistical analyses were "virtually meaningless," because they were based on the faulty assumption that female sales applicants were as "interested" as male applicants in commission sales jobs.⁸ Indeed, the EEOC had "turned a blind eye to reality,"⁹ for Sears had proved that women sales applicants preferred lower-paying noncommission

³ 628 F. Supp. 1264 (N.D. Ill. 1986), *aff'd*, 839 F.2d 302 (7th Cir. 1988).

⁴ Title VII is the major federal statute prohibiting discrimination in employment. It prohibits employers with 15 or more employees from discriminating on the basis of race, color, religion, sex, or national origin. See 42 U.S.C. §§ 2000e to 2000e-17 (1982).

⁵ Between 1973 and 1980 the median hourly wages for first-year commission salesworkers were about twice as high as those for all noncommission salesworkers. See Plaintiff's Pretrial Brief — Commission Sales Issues at 27, *EEOC v. Sears, Roebuck & Co.*, 628 F. Supp. 1264 (N.D. Ill. 1986) (No. 79-C-4373).

⁶ Between 1973 and 1980, for example, women constituted 61% of all full-time sales applicants at Sears, but only 27% of the newly hired full-time commission salesworkers. In contrast, women made up approximately 75% of Sears' noncommission salesforce. See Brief for the Equal Employment Opportunity Comm'n as Appellant at 7, *EEOC v. Sears, Roebuck & Co.*, 839 F.2d 302 (7th Cir. 1988) (Nos. 86-1519 and 86-1621) [hereinafter EEOC Brief].

⁷ Sears conceded that it had established no objective qualifications for the commission sales job. See *Sears*, 628 F. Supp. at 1290. Nonetheless, the EEOC performed two types of multiple regression analyses that controlled for any differences between the male and female sales applicants on various characteristics that may have influenced their selection into commission sales, including age, education, job applied for, job type experience, product line experience, and expanded commission sales experience. See *id.* at 1296-98; EEOC Brief, *supra* note 6, at 20-26.

⁸ See *Sears*, 628 F. Supp. at 1305. The EEOC could not reconstruct a precise pool of applicants who specifically preferred commission sales, because Sears' application form did not provide separate boxes for commission and noncommission sales jobs. See EEOC Brief, *supra* note 6, at 7-8. The EEOC's regression analyses did control for any preferences the applicants had written in by hand, see *id.* at 22-23, 128-29, even though fewer than half of those hired for commission sales had written in a preference for that job, see *Sears*, 628 F. Supp. at 1296 & n.21; EEOC Brief, *supra* note 6, at 27-28.

⁹ *Sears*, 628 F. Supp. at 1324.

sales jobs.¹⁰ The judge credited various explanations for women's "lack of interest" in commission sales, all of which rested on conventional images of women as "feminine" and nurturing, unsuited for the vicious competition in the male-dominated world of commission selling.¹¹ In the court's eyes, Sears had done nothing to segregate its salesforce; it had merely honored the preexisting employment preferences of working women themselves.

Few recent cases have received more attention — or provoked more controversy — than *Sears*.¹² The extraordinary attention given the case suggests that it was somehow unusual and therefore noteworthy. Indeed, some commentators' sense of shock rests on an assumption that *Sears* represented a sharp break from the past, a giant step backward in an otherwise uninterrupted path of progress in dismantling sex segregation through title VII litigation.¹³ At best,

¹⁰ See *id.* at 1324–25. The judge reached this conclusion despite evidence that women who worked at Sears needed to maximize their incomes. For example, a 1981 survey of married women employed in noncommission sales jobs showed that 28% had unemployed husbands, 35% had husbands who earned below the \$20,260 national median income for men, and an additional 19% had husbands who earned below \$25,000 per year. See Written Testimony of Eileen Appelbaum at 18–19 & n.27, *EEOC v. Sears, Roebuck & Co.*, 628 F. Supp. 1264 (N.D. Ill. 1986) (No. 79-C-4373).

¹¹ According to the judge, women shunned the "big ticket," "hard" lines of merchandise, such as home improvements, hardware, and men's clothing, which were more likely to be sold on commission at Sears; they felt more comfortable with the "small ticket," "soft" lines, such as jewelry, cosmetics, and women's clothing, which were sold on a noncommission basis. See *Sears*, 628 F. Supp. at 1306. In addition, women "disliked the perceived dog-eat-dog competition" and "financial risk" of commission sales, preferring the "security" and "more enjoyable and friendly" nature of noncommission sales. See *id.* at 1307.

¹² The news media reported developments in the case from its inception and speculated about its effect on the future of title VII enforcement. See, e.g., Hunter, *U.S. Files Five Suits Charging Sears with Job Bias*, N.Y. Times, Oct. 23, 1979, at A1, col. 4; Williams, *Despite Class-Action Doubts, EEOC Presses Sears Bias Case*, Wash. Post, July 9, 1985, at A1, col. 1; Pear, *Changes Weighed in Federal Rules on Discrimination*, N.Y. Times, Dec. 3, 1984, at A1, col. 6; Greenhouse, *Federal Judge Rules for Sears in Sex Bias Case*, N.Y. Times, Feb. 4, 1986, at A21, col. 2; Lewin, *Statistics Have Become Suspect in Sex Discrimination Cases*, N.Y. Times, Feb. 9, 1986, § 4, at E8. Two prominent women's historians testified on opposite sides of the issue of women's "interest" in nontraditional work, and both sought to vindicate their positions publicly after the suit was resolved. Compare Kessler-Harris, *Equal Employment Opportunity Commission v. Sears, Roebuck and Company: A Personal Account*, 1986 RADICAL HIST. REV. 57 (defending her testimony for the EEOC) with Rosenberg, *What Harms Women in the Workplace*, N.Y. Times, Feb. 27, 1986, at A23, col. 1 (defending her testimony for Sears). In addition, numerous scholars have analyzed the *Sears* case, discussing its significance for the contemporary debate about gender difference in our society. See Finley, *Choice and Freedom: Elusive Issues in the Search for Gender Justice*, 96 YALE L.J. 914, 937–40 (1987); Milkman, *Women's History and the Sears Case*, 12 FEMINIST STUD. 375 (1986); Scott, *Deconstructing Equality-Versus-Difference: Or, the Uses of Poststructuralist Theory for Feminism*, 14 FEMINIST STUD. 33, 38–47 (1988); Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797, 814 (1989).

¹³ See, e.g., Lewin, *supra* note 12; Pear, *supra* note 12. One legal scholar stated this assumption explicitly, arguing that the *Sears* court's acceptance of the lack of interest argument

commentators have analyzed *Sears* in isolation, creating the impression that it is the first case in which an employer has dared to argue — or a court has deigned to affirm — that workplace segregation is attributable to women's own choice.

In fact, neither the issues nor the outcome in *Sears* are new. For almost two decades, employers have argued successfully that they had no role in creating sex segregation in their workforces. "It's not our fault," they say. "We don't exclude women from men's jobs. In fact, we've been trying to move women into those jobs. The trouble is, women won't apply for them — they just aren't interested. They grow up wanting to do women's work, and we can't force them to do work they don't want to do."¹⁴ Almost half the courts to consider the issue have accepted this explanation and attributed women's disadvantaged place in the workplace to their own lack of interest in more highly valued nontraditional jobs.¹⁵

This Article places the *Sears* case in historical and theoretical context. It studies all published title VII decisions since 1965 in which employers have sought to justify sex segregation as the expression of women's own lack of interest in nontraditional jobs. An analysis of the results, evidentiary approaches, and reasoning in these cases shows that there has been a continuing (if not always conscious) sexism in the way working women have been envisioned within the law. The women who predominate in these cases are working-class women.¹⁶ Many are women of color,¹⁷ seeking jobs traditionally held by men

represented "a dramatic reversal of existing Title VII law," Williams, *Deconstructing Gender*, *supra* note 12, at 819, which succeeded for the first time in "enshrining gender stereotypes at the core of Title VII," *id.* at 814.

¹⁴ Employers also resort to this argument to justify sex segregation outside the litigation context. As one researcher summarized managers' views: "The conclusion is: 'It's not our fault' [E]veryone places the blame, far away from the workplace. A unanimous chorus repeats: it's the parents' fault, it's the teachers' fault, it's the fault of the career advisers. And, of course, fundamentally, it's women's fault: 'they are their own worst enemies.'" C. COCKBURN, *MACHINERY OF DOMINANCE: WOMEN, MEN AND TECHNICAL KNOW-HOW* 165 (1985). For similar descriptions of how managers have rationalized segregation, see V. BEECHY & T. PERKINS, *A MATTER OF HOURS: WOMEN, PART-TIME WORK AND THE LABOUR MARKET* 102-19 (1987); and L. HOWE, *PINK COLLAR WORKERS: INSIDE THE WORLD OF WOMEN'S WORK* 90-91 (1977).

¹⁵ By "nontraditional" jobs, I refer to the jobs in which women workers are significantly underrepresented in the particular establishments they are suing. I also refer to such jobs as "male-dominated," "traditionally male," or "male" jobs, throughout this Article. By contrast, I use the terms "traditional," "traditionally female," "female-dominated," or "female" jobs to refer to the jobs in which women workers are overrepresented in the particular establishments they are suing. I use these terms only as convenient labels; I do not mean to suggest that there is any historical consistency, cross-cultural agreement, or even uniformity across or within firms about which jobs are appropriate for men and women.

¹⁶ See *infra* notes 80-81 and accompanying text.

¹⁷ See *infra* notes 74 and 82 and accompanying text. Faced with the intersecting disadvantage of racial and sexual discrimination, women of color have often been excluded from work deemed appropriate for white women. For accounts of labor market discrimination against

rather than jobs held by white women.¹⁸ Working-class women have shared the experience of being marginalized at work, but being unable to opt out.¹⁹ They have made a high priority of ending job segregation,²⁰ for they want work that will enable them to support themselves and their families with security while providing challenge, a sense of accomplishment, and control over their own lives. Our society, however, has long viewed these women as inauthentic workers, uncommitted to wage work as an important life interest and source of

African-American, Hispanic, and Chinese-American women, see, for example, J. JONES, *LABOR OF LOVE, LABOR OF SORROW: BLACK WOMEN, WORK, AND THE FAMILY FROM SLAVERY TO THE PRESENT* (1985); P. ZAVELLA, *WOMEN'S WORK AND CHICANO FAMILIES: CANNERY WORKERS OF THE SANTA CLARA VALLEY* (1987); Glenn, *Racial Ethnic Women's Labor: The Intersection of Race, Gender, and Class Oppression*, in *HIDDEN ASPECTS OF WOMEN'S WORK* 46 (C. Bose, R. Feldberg & N. Sokoloff eds. 1987); and Malveaux & Wallace, *Minority Women in the Workplace*, in *WORKING WOMEN: PAST, PRESENT, FUTURE* 265 (K. Koziara, M. Moskow & L. Tanner eds. 1987).

¹⁸ Without intending to deny or ignore the unique discrimination experienced by women of color, this Article analyzes the courts' treatment of sex discrimination claims brought by working women of various racial and ethnic groups in an effort to obtain jobs traditionally done by men. Since the enactment of title VII, women of color have made more progress entering occupations traditionally held by white women than they (or white women) have made in entering occupations traditionally held by men. Researchers typically estimate the extent of occupational segregation with a construct called the index of dissimilarity, which measures the proportion of workers who would have to switch to occupations atypical for their sex or race in order for occupations to be integrated. While the index of race segregation between minority women and white women workers declined substantially from 46.8% in 1960 to 17.2% in 1981, the index of sex segregation between minority women and minority men declined much more modestly during the same period from 54.0 to 47.9. See Albelda, *Occupational Segregation by Race and Gender, 1958-81*, 39 *INDUS. & LAB. REL. REV.* 404, 405-06 (1986). Similarly, while the index of race segregation between minority men and white men declined from 38.4 in 1960 to 23.8 in 1981, the index of sex segregation between white women and white men declined more modestly from 59.6 to 53.0. See *id.* The greatest difference in occupational distribution between any two groups was, of course, between minority women and white men. The index of segregation began at 67.2 in 1960 and declined to only 58.1 in 1981. See *id.* For other studies reporting similar findings, see J. JONES, cited above in note 17, at 301-03; *WOMEN'S WORK, MEN'S WORK*, cited above in note 1, at 19; and Beller, cited above in note 1, at 20.

¹⁹ Historically, African-American women, immigrant women, and low-income native-born white women have engaged in wage work in large numbers, despite being relegated to undesirable jobs. See, e.g., J. JONES, *supra* note 17; S. KENNEDY, *IF ALL WE DID WAS TO WEEP AT HOME: A HISTORY OF WHITE WORKING-CLASS WOMEN IN AMERICA* (1979); A. KESSLER-HARRIS, *OUT TO WORK: A HISTORY OF WAGE-EARNING WOMEN IN THE UNITED STATES* (1982); Milkman, *A Statistical Portrait*, in 2 N. HEWITT, *WOMEN, FAMILIES, AND COMMUNITIES: READINGS IN AMERICAN HISTORY* 249 (1990). Estimates of women's historical labor force participation are known to be too low because of the U.S. Census Bureau's practices of undercounting work done by women. See, e.g., Bose, *Devaluing Women's Work: The Undercount of Women's Employment in 1900 and 1980*, in *HIDDEN ASPECTS OF WOMEN'S WORK*, *supra* note 17, at 95.

²⁰ See, e.g., *Working Women's 1980 Platform*, reprinted in P. FONER, *WOMEN AND THE AMERICAN LABOR MOVEMENT: FROM THE FIRST TRADE UNIONS TO THE PRESENT* 497 (1980) (demanding the elimination of job segregation by sex as one of the highest priorities for working women).

identity. This view has justified relegating them to dead-end, female-dominated jobs at the lowest rung of the economic ladder.

Title VII promised working women change. But, consciously or unconsciously, courts have interpreted the statute with some of the same assumptions that have historically legitimated women's economic disadvantage. Most centrally, courts have assumed that women's aspirations and identities as workers are shaped exclusively in private realms that are independent of and prior to the workworld.²¹ By assuming that women form stable job aspirations before they begin working, courts have missed the ways in which employers contribute to creating women workers in their images of who "women" are supposed to be. Judges have placed beyond the law's reach the structural features of the workplace that gender jobs and people,²² and disempower women from aspiring to higher-paying nontraditional employment.

This Article proceeds as follows. Part II shows that the Supreme Court has delegated to lower courts the discretion to determine whether and when to accept the lack of interest argument. I then describe my methods of collecting and analyzing the lower court decisions that form the basis for the two-part study in Parts III and IV.

Part III examines how the courts have created a framework for interpreting sex segregation that posits two mutually exclusive expla-

²¹ I use the term "workworld" to refer to all aspects of wage work as a sphere of activity or interest. People's experiences in the workworld include both the experience of searching for work in particular labor markets and the experience of working in jobs in particular workplaces. In stating that courts assume that women form their work aspirations in private realms that are "prior to" the workworld, I mean to suggest a definition that captures a dimension of both temporal and metaphysical priority. The temporal dimension is reflected in the view that women form stable work aspirations through early sex-role socialization that is completed long before they ever begin working or searching for work. This in turn implies an almost metaphysical dimension: women's job preferences are "fixed" in advance, so that they constitute predetermined inputs to the labor market. Throughout this Article, I refer to the realms in which courts imagine women's job preferences to be formed as "pre-work," "pre-workworld," or "pre-labor market" realms. I refer to the view that women form stable job preferences in such realms as the "pre-labor market" explanation for sex segregation. See *infra* Part V.

²² Throughout this Article, I use the term "gender" as a noun to refer not to the biological sex of a human being, but rather to the complex of social and cultural differences the dominant society attributes to biological men and women. See 6 OXFORD ENGLISH DICTIONARY 428 (2d ed. 1989) (recognizing the modern feminist distinction between sex and gender by defining gender as the "social and cultural, as opposed to the biological, distinctions between the sexes"); cf. 15 *id.* 107-10 (defining sex). Similarly, I use gender as a verb to refer to the processes of attributing social and cultural differences to biological men and women and, by extension, to the activities commonly associated with them. A major theme of this Article is that the workworld is a central site where people's social identities as men and women are created and contested. Thus, when I state that gender is constructed at work or that work processes gender people and jobs, I mean that employers structure labor markets, work, and workplaces in ways that assign and actually create differences between biological men and women as well as the work they do.

nations: women's "choice" and employers' "coercion." I trace how the courts have developed this framework and have decided in particular cases which of these competing explanations to adopt through standardized approaches to evaluating the evidence. Part IV analyzes the choice and coercion explanations as separate "stories" that justify different legal results. Although these two explanations lead to different outcomes, both assume that women bring to the labor market fixed preferences for traditional or nontraditional jobs. This judicial framework has created an unduly narrow definition of sex discrimination and an overly restrictive role for the law in dismantling sex segregation.

Part V draws on recent sociological research to challenge the assumption that women form stable job preferences through pre-work socialization and to create an alternative account of the development of work aspirations that holds more promise for understanding and changing the dynamics of sex segregation in the workplace. In this new account, women develop their work preferences only in the context of and in response to structural features of the workworld itself. Part VI concludes by sketching the broad implications of this new account for title VII law. It suggests that judges must approach the question whether women are "interested" in nontraditional work with a greater self-consciousness about the law's role in creating women's work aspirations.

I write, then, from a conviction that what judges say and do matters. Courts have authority to help or hinder working women in their struggle against marginalization and segregation into low-paying, low-status jobs. Judges' interpretations of sex segregation enter a broader stock of cultural knowledge that organizes people's experience and gives meaning to what we see when we observe men and women doing separate tasks in everyday life.²³ An interpretation that portrays women as having formed their job preferences before they ever enter the workworld renders invisible all the ways in which employers disempower women from claiming nontraditional jobs. As such, it rationalizes the sex-segregated status quo. But if law organizes meaning, it also orchestrates power. Judicial decisions establish the terms within which women workers not involved in litigation will bargain

²³ As my use of the metaphor of interpretation suggests, I believe that what courts say about sex segregation influences more broadly how people not involved in the immediate legal contest understand that reality. For earlier work in the interpretive tradition, see, for example, Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989), which examines the use of storytelling in the struggle for racial justice; Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727 (1988), which explores how social workers helped shape legal discourse in child custody cases so as to disempower custodial mothers; and Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 YALE L.J. 1860 (1987), which argues for an interpretive approach to law that defends rights as tools for expressing communal aspirations.

with their employers about segregation in the future.²⁴ Furthermore, courts have the institutional authority to order, or decline to order, changes in employers' practices and arrangements. When judges impose liability, they can dramatically alter the sexual composition of employers' workforces or job classifications.²⁵ Conversely, when courts refuse to intervene, segregation will likely continue. Thus, judges have the power to create the conditions that make their stories about sex segregation come true.

II. THE CONTEXT FOR THE STUDY

The story of how courts have dealt with sex segregation in the workplace is necessarily a story about how they have treated statistical evidence in title VII cases. The purpose of statistical evidence is to demonstrate that women or minorities are significantly underrepresented in the employer's workforce or in certain jobs, thereby proving the existence of the patterns of segregation that the plaintiffs seek to dismantle.²⁶ From the beginning of title VII enforcement, judges recognized that plaintiffs would often be forced to rely on statistical evidence "to uncover clandestine and covert discrimination."²⁷ But almost as quickly as plaintiffs began to use statistical evidence, employers began to devise strategies to undermine its probative value.

²⁴ See *infra* note 71.

²⁵ There are many documented cases of dramatic increases in female participation in non-traditional jobs in response to court orders and court-supervised consent decrees. See, e.g., COUNCIL ON ECONOMIC PRIORITIES, WOMEN AND MINORITIES IN BANKING: SHORTCHANGE/UPDATE 68 (1976) (recording a 166% increase in female participation in managerial, professional, technical and salesworker jobs, and an even greater increase in female participation in blue-collar jobs, at a major bank between 1971 and 1975); K. DEAUX & J. ULLMAN, WOMEN OF STEEL: FEMALE BLUE-COLLAR WORKERS IN THE BASIC STEEL INDUSTRY 85 (1983) (recording a 170% increase in female participation in production, maintenance, and craft positions in two steel mills between 1976 and 1979); Appendix D, in EQUAL EMPLOYMENT OPPORTUNITY AND THE AT&T CASE 343 (P. Wallace ed. 1976) (recording a 119% increase in female participation in craft jobs and a 46% increase in female participation in managerial jobs between 1973 and the end of 1974).

²⁶ In classwide title VII cases, a plaintiff makes a *prima facie* case of discrimination by demonstrating a gross disparity between the number of protected class members hired by the employer and the number of qualified protected class members who would have been available for hire in the absence of discrimination. See, e.g., *Hazelwood School Dist. v. United States*, 433 U.S. 299, 307-08 (1977); *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 n.20 (1977). In its most dramatic form, statistical proof reveals that the employer has never hired any women or minorities or, more commonly, has never hired them for the higher-paying jobs. See *Teamsters*, 431 U.S. at 342 n.23 (referring to the "inexorable zero" as powerful proof of intentional discrimination).

²⁷ *Teamsters*, 431 U.S. at 340 n.20 (quoting *United States v. Ironworkers Local 86*, 443 F.2d 544, 551 (9th Cir.), *cert. denied*, 404 U.S. 984 (1971), and citing other early courts of appeals decisions).

One central strategy has been the lack of interest argument. Since 1967,²⁸ employers have sought to justify patterns of sex and race segregation in their workforces by arguing that these patterns resulted not from any actions they had taken, but rather from women's and minorities' own lack of interest in higher-paying nontraditional jobs. The lack of interest argument attacks the meaningfulness even of statistical evidence showing egregious, long-standing patterns of segregation. For if these patterns are the expression of women's or minorities' independent work preferences, then employers cannot be blamed. Whether such preferences are attributable to biological influences or to pre-work socialization, the point is that employers are not responsible.

*A. Supreme Court Decisions Addressing
the Lack of Interest Argument*

Although the lower courts have been wrestling with the problem of interpreting statistical evidence for over twenty years, the Supreme Court has never clarified the circumstances in which the lack of interest argument constitutes a valid defense to discrimination. Indeed, in three 1977 decisions, *International Brotherhood of Teamsters v. United States*,²⁹ *Dothard v. Rawlinson*,³⁰ and *Hazelwood School District v. United States*,³¹ the Court expressly delegated to the trial courts the discretion to decide on a case-by-case basis whether to accept the lack of interest argument.³²

In *Teamsters*, the lack of interest argument arose in the remedial, rather than the liability, stage of a classwide disparate treatment

²⁸ The earliest case I found that addresses the lack of interest argument is *Cypress v. Newport News General & Nonsectarian Hospital Association*, 375 F.2d 648, 653 (4th Cir. 1967). For a fuller discussion of this case, see pp. 1772-73 below.

²⁹ 431 U.S. 324 (1977).

³⁰ 433 U.S. 321 (1977).

³¹ 433 U.S. 299 (1977).

³² Although *Teamsters* and *Hazelwood* are race discrimination cases, they provide precedent for how to analyze the lack of interest argument in sex discrimination cases as well. Title VII's anti-discrimination provisions make no distinction between race and sex discrimination. See 42 U.S.C. § 2000e-2(a)(1)-(2) (1982). The Supreme Court has never suggested that race and sex discrimination are to be analyzed differently under title VII. To the contrary, the Court's title VII decisions have consistently used the same approaches to analyze race and sex discrimination, citing precedent from the two contexts interchangeably. See, e.g., *Johnson v. Transportation Agency*, 480 U.S. 616, 631 (1987) (citing *United Steelworkers of America v. Weber*, 443 U.S. 193, 197 (1979), to uphold the validity under title VII of an affirmative action plan for women); *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 66-67 (1986) (citing title VII decisions recognizing a cause of action for racial harassment to support recognizing a cause of action for sexual harassment creating a hostile work environment). Indeed, in *Dothard*, a sex discrimination case, the Court supported its analysis of the lack of interest issue with a reference to its earlier analysis of the same issue in *Teamsters*. See *infra* p. 1762.

suit.³³ The government proved that the defendant trucking company had engaged in a pattern or practice of intentional discrimination, refusing to hire African-Americans and Hispanics for line-driver jobs and relegating the few it had hired to lower-paid city-driver jobs.³⁴ The company argued that, as a matter of law, minority employees who had failed to apply for line-driver jobs could not be considered victims of discrimination and hence could not be awarded individual relief. The Supreme Court rejected this argument, reasoning that a class member's failure to apply may not reflect a lack of interest, but rather only the chilling effects of the employer's discriminatory practices:

If an employer should announce his policy of discrimination by a sign reading "Whites Only" on the hiring-office door, his victims would not be limited to the few who ignored the sign and subjected themselves to personal rebuffs. The same message can be communicated to potential applicants more subtly but just as clearly by an employer's actual practices — by his consistent discriminatory treatment of actual applicants, by the manner in which he publicizes vacancies, his recruitment techniques, his responses to casual or tentative inquiries, and even by the racial or ethnic composition of that part of his work force from which he has discriminatorily excluded members of minority groups.³⁵

In spite of this recognition, the Court invalidated the Fifth Circuit's remedial approach, under which all minority employees were presumed to have applied for line-driver jobs because all were likely to have been aware of the futility of seeking them. Stating that the "desirability of the [line-driver job] is not so self-evident as to warrant a conclusion that all employees would prefer to be line drivers if given a free choice,"³⁶ the Court held that no minority non-applicant could secure relief without first proving that he or she would have applied to be a line-driver in the absence of the company's discrimination.³⁷

³³ Classwide disparate treatment suits typically are tried in two stages. The first stage addresses whether the employer has engaged in a regular practice of discriminating against protected class members as a group. See *Teamsters*, 431 U.S. at 336 & n.16. The second stage allocates relief to individual victims of discrimination if liability is established. See *id.* at 361-62. Classwide disparate treatment cases include both private class actions initiated under Federal Rule of Civil Procedure 23 and pattern or practice cases brought by the Department of Justice or the EEOC under § 707(a) of title VII, 42 U.S.C. § 2000e-6(a) (1982).

³⁴ See *Teamsters*, 431 U.S. at 342-43.

³⁵ *Id.* at 365.

³⁶ *Id.* at 369.

³⁷ See *id.* at 371-72. The Court held that a minority non-applicant who proves that he or she would have applied but for discrimination stands in the same position as one who did apply. At that point, the employer bears the burden of proving that he would not have hired the person anyway, because of a legitimate nondiscriminatory reason such as the lack of a vacancy, even in the absence of the already proven pattern of discrimination. See *id.* at 357-62, 367-68.

Thus, the Court adopted an individualized approach in which the trial court was to determine, as a factual matter, whether each minority non-applicant failed to apply because of discrimination or instead because of an independent lack of interest in the work. This approach to the lack of interest argument at the remedial stage, however, provided the lower courts with little guidance for evaluating the argument when it is raised as a defense to classwide discrimination at the liability stage.³⁸

The lack of interest argument was asserted as a defense to classwide discrimination in *Dothard*,³⁹ the only sex discrimination case in which the Court has addressed the issue.⁴⁰ The district court held that the Alabama Board of Corrections' use of minimum height and weight requirements to select prison guards had an unlawful disparate impact on women.⁴¹ Alabama contended that the district court had

³⁸ The lack of interest argument involves different considerations when asserted during the liability, as opposed to the remedy, stage of a classwide discrimination suit. In raising the lack of interest argument during the remedial phase, the employer is claiming that some individual class member would not have been interested in some nontraditional job, even if the employer had always welcomed protected class members into that job. This claim rests on an assertion about the work preference of a particular claimant, *as an individual*, that is not necessarily related to that person's race or sex. See *id.* at 369-70 (acknowledging that even some whites, who had never been subjected to discrimination, had failed to express interest in the line-driver job). But in raising the lack of interest argument during the liability phase, the employer is claiming that minorities or women are, *as a group*, systematically less interested than whites or men in the nontraditional work at issue. This claim necessarily rests on an assertion that there is something distinctive about minorities' or women's work preferences that is directly attributable to their race or sex.

³⁹ *Dothard v. Rawlinson*, 433 U.S. 321 (1977).

⁴⁰ In *Johnson v. Transportation Agency*, 480 U.S. 616 (1987), the Supreme Court upheld the validity under title VII of an affirmative action program for women, holding that the plan was justified by the "manifest imbalance" that reflected underrepresentation of women in "traditionally segregated job categories" in Santa Clara County's workforce. *Id.* at 631 (citing *United Steelworkers of America v. Weber*, 443 U.S. 193, 197 (1979)). Although the majority did not mention the issue of women's interest in the county's nontraditional jobs, Justice Scalia argued in dissent that the absence of women from road maintenance work was attributable not to historical discrimination, but rather to women's own lack of interest in such work. See *id.* at 668 (Scalia, J., dissenting). Because *Johnson* involved the validity of a voluntary affirmative action plan rather than the county's liability for sex discrimination against women, I do not analyze the case here. *Johnson* did not influence the lower court decisions in my study: only three cases were decided after *Johnson*, and none of them cited *Johnson* in analyzing the lack of interest issue. See *EEOC v. General Tel. Co.*, 885 F.2d 575 (9th Cir. 1989); *EEOC v. Sears, Roebuck & Co.*, 839 F.2d 302 (7th Cir. 1988); *Palmer v. Shultz*, 815 F.2d 84 (D.C. Cir. 1987).

⁴¹ In a disparate impact case, a plaintiff need not prove that the employer acted with discriminatory purpose or intent. To establish a *prima facie* case of discrimination, the plaintiff need only show that apparently neutral selection criteria operated to exclude protected class members at a disproportionate rate. See, e.g., *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971). The employer bears the burden of justifying the challenged criteria. The Supreme Court recently held that the employer's burden is merely one of "producing evidence of a business justification for his employment practice[s]." *Wards Cove Packing Co. v. Atonio*, 109 S. Ct. 2115, 2126 (1989). Before *Wards Cove*, lower courts had held that the employer's burden is the

erred in concluding that plaintiffs' statistical data, which measured the effects of the height and weight requirements on the U.S. population, established a prima facie case of disparate impact.⁴² According to the state, a prima facie case could be made only with data showing that women who had actually applied to be prison guards were disproportionately excluded by the challenged requirements. Alabama's position rested on a lack of interest argument, which implied that the height and weight requirements could have no disparate impact because only women who were sufficiently tall and heavy to meet them would be interested in applying to be prison guards in the first place. Justice White agreed with this position in dissent, stating that he was not "convinced that a large percentage of the actual women applicants, or those who are seriously interested in applying, for prison guard positions would fail to satisfy the height and weight requirements."⁴³

The majority rejected the State's position and held that the plaintiffs were not required to use applicant data to make a prima facie case. But the Court failed to clarify whether and when an employer might use applicant data to defeat a prima facie case with the lack of interest argument. In a passage that seemed to acknowledge that such an approach has the potential to undermine the entire disparate impact model,⁴⁴ the Court recognized that the applicant pool might not accurately reflect the characteristics of women interested in the job: "Otherwise qualified people might be discouraged from applying because of a self-recognized inability to meet the very standards challenged as being discriminatory. . . . A potential applicant could easily determine her height and weight and conclude that to make an application would be futile."⁴⁵ In another passage, however, the Court emphasized that the state had made no effort to introduce any evidence to undermine the plaintiffs' prima facie showing.⁴⁶ In contrast

heavier one of persuading the court of the business necessity of the challenged practices. *See id.* at 2130 & n.14 (Stevens, J., dissenting) (citing earlier courts of appeals' decisions).

⁴² Plaintiffs' statistics showed that only 58.9% of all women in the United States between the ages of 18 and 79 could meet Alabama's height and weight requirements, whereas 99.8% of men could do so. Only 12.9% of the state's prison guards were women. *See Dothard*, 433 U.S. at 329-30 & n.12.

⁴³ *Id.* at 348 (White, J., dissenting).

⁴⁴ If the disparate impact model is to have any meaning, plaintiffs must be able to establish the disproportionate impact of the requirements they are challenging with reference to some pool of potential workers besides the applicant pool. Otherwise, employers could always argue that only women or minorities who satisfy the requirements were interested enough in the job to apply; by definition, the requirements would not operate to exclude those who already meet them.

⁴⁵ *Dothard*, 433 U.S. at 330 (citing *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 365-67 (1977)).

⁴⁶ *See id.* at 331; *see also id.* at 337-39 (Rehnquist, J., concurring) (emphasizing that the state had made virtually no effort to challenge the plaintiffs' prima facie statistical showing in the trial court).

to the earlier passage, this emphasis on the state's failure to meet its burden of proof seemed to leave open the possibility that an employer might rely on applicant data to attribute women's underrepresentation to their lack of interest in the job, rather than to the impact of the challenged requirements. Thus, although *Dothard* clarified that it is the employer's burden to prove the lack of interest argument, the Court left it to the trial courts to determine on a case-by-case basis how an employer might meet that burden.⁴⁷

In *Hazelwood*⁴⁸ the Court made even clearer that the trial courts are to resolve the interest issue. The Department of Justice alleged that Hazelwood, a school district in an almost all-white suburb of St. Louis, was intentionally discriminating on the basis of race in selecting its teachers. Relying on the fact that Hazelwood's recent past was tainted by discrimination⁴⁹ and that the vast majority of Hazelwood's teachers had come from the city of St. Louis and the surrounding county,⁵⁰ the Eighth Circuit held that the combined city/county area was the relevant labor market from which Hazelwood would have drawn its teachers in the absence of discrimination. Because there was a gross disparity between the racial composition of the teachers employed in the city/county area and the racial composition of the teachers employed at Hazelwood,⁵¹ the court of appeals reversed the district court and directed judgment for the Justice Department.⁵²

In the Supreme Court, Hazelwood contended that the city/county figure provided an inappropriate basis for comparison to its post-title VII hiring record,⁵³ because the city of St. Louis school district's

⁴⁷ See 433 U.S. at 331 (stating that the district court was entitled to find that the height and weight requirements had a disparate impact where the defendant introduced no evidence to the contrary); see also *id.* at 338 (Rehnquist, J., concurring) ("It is for the District Court . . . to determine whether [the] statistics appear sufficiently probative of the ultimate fact in issue — whether a given job qualification requirement has a disparate impact on some group protected by Title VII.").

⁴⁸ *Hazelwood School Dist. v. United States*, 433 U.S. 299 (1977).

⁴⁹ See *id.* at 302-03 & nn.2 & 4, 304 n.7.

⁵⁰ Eighty percent of Hazelwood's teachers had come from the city of St. Louis or the surrounding county, and one-third from the city alone. See *id.* at 315 n.2 (Stevens, J., dissenting).

⁵¹ In 1970, 15.4% of all teachers in the city of St. Louis and the surrounding county (which included Hazelwood) were black. Yet in 1972 and 1973, blacks constituted less than 2% of Hazelwood's teaching staff, see 433 U.S. at 303-05, and only 3.7% of its newly hired teachers, see *id.* at 310.

⁵² In ruling against the government, the district court had relied in part on the fact that the racial composition of Hazelwood's teaching staff differed only slightly from the racial composition of its students. The Supreme Court affirmed the Eighth Circuit's holding that this comparison was erroneous as a matter of law, because the proper basis of comparison was the racial composition of the qualified school teachers in the relevant labor market. See *id.* at 304-05, 308-09.

⁵³ Hazelwood also contended that the court of appeals had erred in failing to consider whether the district had discriminated in hiring after title VII became applicable to public employers in

efforts to maintain a fifty percent black teaching staff had diverted to the city a disproportionate number of black teachers who might otherwise have been interested in Hazelwood. Hazelwood's position rested on a lack of interest argument, for there was no reason to suppose that St. Louis could meet its goal unless black teachers disproportionately preferred teaching there over Hazelwood.⁵⁴ The case potentially turned on this issue, for if the city were excluded from the relevant labor market, the percentage of black teachers in the county alone decreased dramatically.⁵⁵ The Supreme Court held that the Eighth Circuit had erred "in substituting its judgment for that of the district court,"⁵⁶ and it remanded the case to the trial court to determine whether the combined city/county figure, the county-only figure, or instead some "intermediate figure," was the most accurate one to form the basis of comparison to Hazelwood's hiring record.⁵⁷ More than once in its opinion, the Court stated that applicant data showing the percentage of blacks among those who had applied to teach at Hazelwood would provide a "very relevant" basis of comparison.⁵⁸

Hazelwood made clear that the specification of the relevant labor market is a factual determination to be made by the trial court.⁵⁹ But the opinion provided no legal standards for how to make this determination and, thus, for how to resolve the lack of interest issue. The Court strongly suggested that the government's statistical evidence established a *prima facie* case of discrimination that was Hazelwood's burden to rebut.⁶⁰ Thus, on remand, Hazelwood would have to produce applicant or other data in the hope of convincing the trial court that the black share of the applicant pool or some other pool of potential workers provided a better basis for comparison to its hiring

1972. See Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (amending 42 U.S.C. § 2000e(a) (1982)). The Supreme Court agreed that because figures showing the racial composition of Hazelwood's teaching staff built in the effect of hiring decisions made before 1972, the most appropriate figures to review were those showing the racial composition of teachers the district had hired since 1972. See *Hazelwood*, 433 U.S. at 308-10.

⁵⁴ See *id.* at 312 (directing the trial court to consider the extent to which black teachers employed by the city would prefer working for other school districts such as Hazelwood); *id.* at 317 (Stevens, J., dissenting) (arguing that the city's 50% goal provided no basis for excluding it from the relevant labor market because there was no proof that black teachers employed by the city preferred working there instead of for Hazelwood).

⁵⁵ Blacks constituted only 5.7% of the teachers employed in the county, excluding the city. See 433 U.S. at 303.

⁵⁶ *Id.* at 309.

⁵⁷ See *id.* at 310-13.

⁵⁸ See *id.* at 308 n.13, 310, 313 n.21.

⁵⁹ See *id.* at 312 ("Only the trial court is in a position to make the appropriate determination after further findings."); see also *id.* at 313 (Brennan, J., concurring) ("[T]oday's opinion revolves around the relative factfinding roles of district courts and courts of appeals.").

⁶⁰ See 433 U.S. at 309-10 (referring to the possibility that Hazelwood might be able to rebut the "prima facie statistical proof"); see also *id.* at 314 (Brennan, J., concurring) (interpreting the majority opinion as holding that the government's statistical proof sufficed to make a *prima facie* case); *id.* at 347-48 (White, J., concurring) (same).

record than the combined city/county area.⁶¹ Unlike its opinions in *Teamsters* and *Dothard*,⁶² however, the Court failed to mention in its instructions to the trial court that an employer's discriminatory practices may discourage minorities from applying.⁶³ This omission was particularly puzzling in light of the evidence of Hazelwood's recent history of discrimination. By defining the determination of the relevant labor market as a factual issue and by failing to provide clear guidelines for how to evaluate applicant data, *Hazelwood* granted the trial courts the discretion to determine on a case-by-case basis whether to attribute minorities' underrepresentation to their own failure to express interest in the work by applying.

In the wake of the Supreme Court's 1977 decisions, the lower courts have taken divergent approaches to evaluating the lack of interest issue. The courts of appeals have disagreed, for example, about the nature of the rebuttal burden to be borne by an employer once a plaintiff establishes a *prima facie* case of classwide disparate treatment.⁶⁴ Some have imposed on the employer only the relatively light burden of "articulating" a nondiscriminatory reason to explain the apparent statistical disparities⁶⁵ and have concluded that this burden is satisfied when employers do little more than present testimony from managers that few women expressed interest in nontraditional jobs.⁶⁶ Other courts have imposed on the employer a heavier burden to rebut the inference of discrimination created by the *prima facie* case⁶⁷ and have insisted that the employer offer more than

⁶¹ See *id.* at 314 (Brennan, J., concurring) (emphasizing that on remand it would be up to Hazelwood to "come forward with more focused and specific applicant-flow data in the hope of answering the Government's *prima facie* case"); *id.* at 347-48 (White, J., concurring) (same).

⁶² See *Dothard v. Rawlinson*, 433 U.S. 321, 330 (1977); *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 365 (1977).

⁶³ See *Hazelwood*, 433 U.S. at 312 (enumerating five factors that the trial court should consider).

⁶⁴ In individual disparate treatment cases, where the inference of discriminatory purpose to be drawn from the plaintiff's *prima facie* case is often relatively weak, the Supreme Court has held that the employer's rebuttal burden is merely that of producing evidence of (or "articulating") a legitimate nondiscriminatory reason to explain the plaintiff's unfavorable treatment. The ultimate burden of persuading the court that it was the plaintiff's race or sex, rather than the employer's stated reason, that motivated the employer remains on the plaintiff. See *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 252-56 (1981); *Segar v. Smith*, 738 F.2d 1249, 1268 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1115 (1985).

⁶⁵ See, e.g., *EEOC v. Sears, Roebuck & Co.*, 839 F.2d 302, 309 (7th Cir. 1988); *Piva v. Xerox Corp.*, 654 F.2d 591, 594 (9th Cir. 1981).

⁶⁶ In practical terms, this means that the plaintiff must offer convincing proof of women's interest in order to meet her overall burden of persuasion. See, e.g., *Sears*, 839 F.2d at 309, 334-38.

⁶⁷ See, e.g., *Griffin v. Carlin*, 755 F.2d 1516, 1526-28 (11th Cir. 1985); *Segar*, 738 F.2d at 1267-70; see also *Bazemore v. Friday*, 478 U.S. 385, 397-404 (1986) (*per curiam*) (Brennan, J., concurring in part) (holding that the employer may not meet its burden of rebutting a plaintiff's *prima facie* case through speculative assertions that factors omitted from the plaintiff's statistical analyses might explain the apparent disparities on a basis other than race).

generalized, undocumented assertions that women were less interested than men in nontraditional jobs.⁶⁸ Furthermore, Supreme Court decisions since 1982 have defined the trial court's determination of whether the employer discriminated as an issue of pure fact subject to reversal only for clear error.⁶⁹ These decisions have further solidified the trial court's authority to determine whether patterns of segregation are attributable to employers' discrimination or instead to women's or minorities' own work preferences.⁷⁰

B. Methodology

Because the Supreme Court has delegated to the lower courts the task of determining the validity of the lack of interest argument, a historical examination of this issue requires studying lower court decisions. The lower courts are the arenas in which plaintiffs and employers have contested the meaning of workplace segregation and from which the formal legal interpretations of that phenomenon have emanated.

This Article examines these interpretations by analyzing a unique data set of all published employment discrimination cases since 1965 in which a lower federal court addressed the lack of interest argument.⁷¹ The data set includes cases raising the argument that women

⁶⁸ See, e.g., *EEOC v. General Tel. Co.*, 885 F.2d 575, 581-82 (9th Cir. 1989); *Palmer v. Shultz*, 815 F.2d 84, 101 (D.C. Cir. 1987).

⁶⁹ See *Anderson v. City of Bessemer*, 470 U.S. 564, 573 (1985); *Pullman-Standard v. Swint*, 456 U.S. 273, 287-88 (1982).

⁷⁰ See, e.g., *Sears*, 839 F.2d at 310 (applying this reasoning to conclude that the trial court's finding with respect to the interest issue is subject to reversal only for clear error).

⁷¹ I searched the following two sources: (1) the Fair Employment Practice Cumulative Digests, published by the Bureau of National Affairs, Volumes 1-46, covering the period from 1965 to 1987 and (2) the West digests, including the Eighth Decennial Digest, Ninth Decennial Digest, the General Digest, Sixth Series, Volumes 1-53, and the General Digest, Seventh Series, Volumes 1-2, together covering the period from 1966 through 1986. Although I searched systematically for all cases in which the lack of interest argument was raised, I may not have found every such case. That would raise no methodological problem, however, so long as my search strategy did not produce a biased selection of cases. There is no reason to suspect that my search yielded any such bias.

I do not claim that the decisions included in my study are representative of any larger sample of title VII cases. Published judicial decisions are probably not a random sample of all judicial decisions. See, e.g., S. Olson, *Studying Federal District Courts Through Published Cases* (June 8-11, 1989) (unpublished manuscript of a paper presented at the annual meeting of the Law and Society Association) (suggesting that civil rights cases are overrepresented among published decisions of federal district courts). In addition, lawsuits tried to judgment are probably not a random sample of all lawsuits that are filed. See, e.g., Priest & Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984). A more complete picture of "the law" would review the terms of pre-trial settlement agreements, since the overwhelming majority of lawsuits are settled before they ever reach trial. See Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 26, 32 (1983). Furthermore, even filed lawsuits are a small portion of legally actionable grievances that might have been brought to

failed to apply for the work at issue, where it is clear that the implicit premise of this argument was that women failed to apply because they lack interest in the work.⁷² I treat as the unit of analysis not the entire case, but rather the specific claim or claims of discrimination in connection with which the lack of interest argument was asserted.⁷³

The data set includes fifty-four such sex discrimination claims,⁷⁴ the first decided in 1972⁷⁵ and the last in 1989.⁷⁶ The lack of interest

the judicial system. See Felstiner, Abel & Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 LAW & SOC. REV. 631, 636 (1980-1981); Trubek, Sarat, Felstiner, Kritzer & Grossman, *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72, 85-87 (1983). There is evidence that people who experience employment discrimination grievances are less likely to take steps to vindicate their rights, including filing lawsuits, than are people who experience other types of grievances. See B. CURRAN, *THE LEGAL NEEDS OF THE PUBLIC* 141-42, 146, 262 (1977); see also Miller & Sarat, *Grievances, Claims, and Disputes: Assessing the Adversary Culture*, 15 LAW & SOC. REV. 525, 537, 540-42, 544-45, 563-64 (1980-1981) (reporting the same finding for people who experience discrimination generally).

⁷² See, e.g., *Dothard v. Rawlinson*, 433 U.S. 321, 330 (1977); *supra* pp. 1761-63 (discussing *Dothard*).

⁷³ A single employment discrimination lawsuit may of course raise a host of different claims, ranging from discrimination in hiring, promotion, transfer, or discharge to claims of retaliation or harassment. In such cases, the employer may assert the lack of interest argument to defend against one or more of these claims (for example, hiring and promotion), but not all of them (for example, discharge and retaliation). In cases in which the court analyzed the lack of interest argument separately as a defense to more than one claim of discrimination, I have included each claim as a separate "case" for purposes of analysis. The primary justification for doing so is that the evidence presented on the interest issue is sometimes very different for separate claims; it would have been impossible to capture the full range of evidence that influenced the outcomes without including each claim as a separate unit. Furthermore, it seemed methodologically indefensible to exclude arbitrarily one claim or the other. In any event, the outcomes are identical regardless of whether all claims or only one claim is included for each case. When all claims are included, plaintiffs prevail in 57.4% (31 out of 54) of the claims, and when only one claim is included, plaintiffs prevail in 57.4% (27 out of 47) of the claims.

⁷⁴ Of the 54 sex discrimination claims analyzed in this study, in 44 (81.5%) the plaintiffs alleged only sex discrimination in connection with their underlying claim. In five (9.3%) more, plaintiffs alleged both race and sex discrimination, and the employer tried to defend the sex claim by asserting that women lack interest, but chose not to defend the race claim by arguing that minorities do. In the remaining five (9.3%) cases, plaintiffs alleged both race and sex discrimination, and the employer tried to defend the sex claim by asserting that women lack interest and tried to defend the race claim by asserting that minorities do. For these last five cases, only the claims for which employers asserted women's lack of interest are designated sex claims and included in this study. This analysis shows that women of color face a potential double risk with respect to the lack of interest argument. As women, they may face the argument that they lack interest because of their gender; as racial minorities, they may face the argument that they lack interest because of their race.

⁷⁵ See *Logan v. General Fireproofing Co.*, 6 Fair Empl. Prac. Cas. (BNA) 140 (W.D.N.C. 1972). The dearth of cases before 1972 is consistent with other studies. See Mills, *On the Use of Equal Employment Laws*, 24 PAC. SOC. REV. 196, 201 (1981) (finding that between 1967 and 1972, district courts in five circuits decided only 20 cases alleging any type of sex discrimination in employment); cf. Stidham, Carp & Rowland, *Women's Rights Before the Federal District Courts, 1971-1977*, 11 AM. POL. Q. 205, 208 (1983) (limiting a study of federal district court cases involving sex discrimination of all types to the period between 1971 and 1977, because "[p]rior to 1971 there were too few women's rights cases to code as a separate case category").

⁷⁶ See *EEOC v. Gen. Tel. Co.*, 885 F.2d 575 (9th Cir. 1989).

argument has been asserted more often in cases alleging classwide discrimination than in cases alleging individual discrimination.⁷⁷ It has arisen in both disparate treatment and disparate impact cases⁷⁸ and in cases brought by federal enforcement agencies as well as private plaintiffs.⁷⁹ Most important, the women whose job interests are questioned in these cases are not economically privileged. In almost three-quarters of the claims, women were trying to obtain relatively low-level blue-collar jobs, mostly in factories.⁸⁰ Furthermore, even most of the white-collar jobs women were seeking were not professional or other high-prestige positions.⁸¹ Women of color initiated a number of the claims.⁸²

In Parts III and IV below, I employ different methods for analyzing how courts have treated the lack of interest argument. Part IV is a study of the rhetoric courts have used to justify their decisions. Part III uses a methodology that is less typical in studies of judicial

⁷⁷ Of the 54 claims in the study, only eight (14.8%) involved individual claims of discrimination. Employers typically assert the lack of interest argument in individual cases for the same reason they do in classwide discrimination cases: to discredit the statistical evidence. In individual cases, the plaintiff often introduces statistical evidence to persuade the court that her treatment was only one instance of a larger pattern of discrimination by the employer. *See, e.g., Davis v. Richmond, F. & P. R.R.*, 593 F. Supp. 271 (E.D. Va. 1984), *aff'd in part and rev'd in part on other grounds*, 803 F.2d 1322 (4th Cir. 1986).

⁷⁸ Thirty-nine of the 54 claims (72.2%) alleged disparate treatment, while 15 (27.8%) alleged disparate impact.

⁷⁹ Fifteen claims (27.8%) involved government participation by the Department of Justice or the EEOC, and 39 (72.2%) involved private plaintiffs only.

⁸⁰ Thirty-nine claims (72.2%) involved blue-collar jobs, while only 15 (27.8%) involved white-collar jobs. Of the blue-collar claims, over half (22, or 56.4%) involved jobs in factories. The remaining blue-collar claims (17, or 43.6%) involved laborer jobs with state or local governmental employers, jobs in the baking or transportation industries, or jobs in law enforcement.

My study includes a higher proportion of blue-collar claims than other studies of sex-based employment discrimination cases. *See, e.g., Burstein, Attacking Sex Discrimination in the Labor Market: A Study in Law and Politics*, 67 SOC. FORCES 641, 648 (1989) (finding that only 12.5% of all federal appellate decisions involved plaintiffs in blue-collar and operative occupations); Mills, *supra* note 75, at 203 (finding that only 39.8% of a sample of federal trial court decisions involved blue-collar jobs). This finding may suggest that claims challenging sex segregation are more likely to involve blue-collar work than other types of claims, or that employers are more likely to assert the lack of interest defense when blue-collar work is involved.

⁸¹ Two of the 15 white-collar claims (13.3%) involved university faculty jobs, another two (13.3%) involved foreign service positions, and one more (6.7%) involved public school administration. The majority of the white-collar claims involved far less prestigious positions as sales agents (six out of 15, or 40%) or low-level supervisors (four out of 15, or 26.7%).

⁸² I attempted to ascertain from each opinion the race and sex of the individual or group of individuals who initiated the lawsuit (that is, the named plaintiffs in a private class action or any persons who filed charges of discrimination in cases brought by the government). Six of the 54 sex claims (11.1%) appear to have been initiated by minority women, and an equal number (11.1%) by white women. Another claim (1.85%) was initiated by minority women and men, and one more (1.85%) by minority and white women. For the vast majority of the sex claims (40 or 74.1%), however, the opinions fail to disclose the race or ethnicity of any individual women who are identified as having initiated the lawsuit.

decisionmaking. For each case in the study, I collected information about the outcome (how the court ruled on the lack of interest argument and the underlying claim of discrimination) and about three types of evidence that may have affected the outcome. This information allowed me to perform content analyses, which examine the relationship between the evidence and the outcomes in the aggregate group of cases.⁸³ I draw on these quantitative analyses of the cases to build a theoretical account of how the courts have constructed a framework for interpreting sex segregation that has limited the law's capacity to dismantle it.

III. THE JUDICIAL FRAMEWORK FOR INTERPRETING SEX SEGREGATION: AN EMPIRICAL STUDY OF HOW THE COURTS HAVE DRAWN THE BOUNDARIES BETWEEN "COERCION" AND "CHOICE"

An analysis of lower court decisions shows that the courts have relied on two mutually exclusive explanations for sex segregation in the workplace. The conservative explanation accepts the lack of interest argument and attributes sex segregation to women workers' own "choice," while the more liberal explanation rejects the lack of interest argument and attributes segregation to employer "coercion."⁸⁴ Even though these interpretations lead to different results, the fact that they are conceptualized as mutually exclusive reveals that they share a common assumption that women form their choices about work, independently of employer action or coercion, in private pre-work realms.

This Part traces how courts have relied on and reinforced that assumption through their evaluations of the evidence pertaining to the lack of interest argument. Both conservative and liberal courts have refused to acknowledge that segregation has arisen because employers have historically restricted women to lower-paying, female-dominated jobs. Judges' failure to recognize the influence of historical discrimi-

⁸³ Only a few other scholars have performed content analyses of employment discrimination cases. None of them has analyzed the relationship between the outcomes and the evidence in the cases, as I do in this study. See Burstein, *supra* note 80; Eisenberg, *Litigation Models and Trial Outcomes in Civil Rights and Prisoner Cases*, 77 GEO. L.J. 1567 (1989); Mills, *supra* note 75; P. Burstein, *Legal Mobilization as a Social Movement Tactic: The Struggle for Equal Employment Opportunity* (1988) (unpublished manuscript of a paper presented at the annual meeting of the American Political Science Association); P. Burstein & S. Pitchford, *Social-Scientific and Legal Challenges to Educational Credential and Testing Requirements in Employment* (June 8-11, 1989) (unpublished manuscript of a paper presented at the annual meeting of the Law and Society Association).

⁸⁴ Throughout this Article, I use the term "conservative" to refer to courts who have accepted the lack of interest argument and the term "liberal" to refer to courts who have rejected that argument.

nation on women's work aspirations has led them to adopt an anti-institutional, individualistic approach to evaluating evidence and conceptualizing discrimination in sex segregation cases. The definition of discrimination is limited to taking specific actions to bar women from exercising what are imagined to be preexisting preferences for nontraditional work. The role of title VII is limited to ensuring that employers do not place formal barriers in the way of women who have managed to form and express preferences for nontraditional work under existing workplace arrangements. To a large extent, however, the structures of the workworld that disempower most working women from ever aspiring to nontraditional work are left unexamined.

This approach was not inevitable. Before the first sex discrimination case raising the lack of interest argument was decided, the courts had already decided a landmark series of race discrimination cases addressing the same argument. In these early race discrimination cases, the courts applied evidentiary standards that presumed that continuing patterns of racial segregation were attributable to historical labor market discrimination, rather than to minorities' independent preferences for lower-paying, less-challenging jobs. This approach recognized that human choices are never formed in a vacuum and that people's work aspirations are inevitably shaped by the job opportunities that have historically been available to them, as well as by their experiences in the work structures and relations of which they have been a part.

I begin by describing the early race discrimination doctrine. My purpose is not to provide a full history of how the lack of interest argument has been evaluated in race discrimination cases⁸⁵ or to suggest a broader comparison of how race and sex discrimination cases have fared in the courts.⁸⁶ It is, rather, to show that there is nothing

⁸⁵ In a forthcoming piece, I analyze how courts have treated the lack of interest argument in race discrimination cases over time. Preliminary results suggest that after a twelve-year period in which courts almost universally rejected employers' attempts to attribute racial segregation to minorities' lack of interest in more remunerative jobs, judges have since 1978 become increasingly more willing to accept this explanation. See V. Schultz & S. Petterson, *Privatizing Work Preferences: A Study of Outcomes and Evidentiary Approaches in Title VII Cases Challenging Job Segregation* (unpublished manuscript on file with the author). The Supreme Court's recent decision in *Wards Cove Packing Co. v. Atonio*, 109 S. Ct. 2115 (1989), may provide enhanced legitimacy for the notion that minorities' underrepresentation in higher-paying work reflects their own cultural preferences rather than employer discrimination. See *id.* at 2122-23 (holding that plaintiffs failed to make a prima facie case of discrimination by showing gross disparities between the proportion of minorities employed in lower-paying and higher-paying jobs, even where the skills required for the two sets of jobs were the same, because most minorities did not seek the higher-paying jobs and plaintiffs failed to prove that the employer's practices discouraged them from doing so); cf. Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1379 (1988) (arguing that the new conservative rationalization for black economic disadvantage is "cultural inferiority").

⁸⁶ Specifically, I do not intend to suggest that since 1965, plaintiffs have experienced greater

necessary about the way courts have approached the interest issue in sex segregation cases, for they had already developed an alternative approach. The early race discrimination doctrine illustrates what the courts can accomplish when their historical and political vision convinces them that it is their responsibility to dismantle workplace discrimination.⁸⁷ That the courts have never taken such an approach in sex discrimination cases is a testimonial to the degree to which judges have accepted the dominant societal view of women as marginal workers. This view is linked to the cultural image of women as beings formed in and for the private domestic sphere, rather than actors shaped like their male counterparts by and for the public world of wage work.

A. Early Race Discrimination Doctrine

Between 1967 and 1971, the lower federal courts decided twelve major cases in which employers argued that African-Americans' or other minorities' failure to express interest by applying explained their underrepresentation in more highly paid work traditionally done by whites. Plaintiffs experienced almost universal success in these cases.⁸⁸ The courts acknowledged that where a historically discrimi-

success in cases challenging race segregation than in cases challenging sex segregation. There are defenses other than the lack of interest argument available to employers to defend segregation in their workforces. An employer might contend, for example, that the statistical disparity is attributable to minorities' or women's relative "lack of qualifications." See *Wards Cove*, 109 S. Ct. at 2122; *EEOC v. Sears, Roebuck & Co.*, 839 F.2d 302, 338-39 (7th Cir. 1988); *Segar v. Smith*, 738 F.2d 1249, 1274-75 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1115 (1985). Although my data do not permit me to test this proposition, employers may have used the lack of qualifications argument more often to justify racial segregation and the lack of interest argument more often to justify sex segregation.

⁸⁷ This vision seems to be receding from the Supreme Court's view. A number of the Court's recent decisions have cut back on broader approaches to dismantling race- and sex-based employment discrimination developed by the lower courts. See, e.g., *Patterson v. McLean Credit Union*, 109 S. Ct. 2363 (1989); *Wards Cove*, 109 S. Ct. 2115; *Price Waterhouse v. Hopkins*, 109 S. Ct. 1775 (1989); *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706 (1989); see also Supreme Court cases cited *infra* note 318. Nonetheless, the lower courts retain the authority to determine the validity of the lack of interest argument, and the Court's recent decisions do not prevent them from taking an approach similar to the one taken in early race discrimination cases. Indeed, *Bazemore v. Friday*, 478 U.S. 385 (1986) (*per curiam*), prohibits the trial courts from rejecting a plaintiff's statistical analyses based solely on the employer's speculative assertion that factors omitted from those analyses might explain the disparity on a neutral basis. See *id.* at 397-404 (Brennan, J., concurring in part).

⁸⁸ In all but two of the cases, the courts rejected the lack of interest argument outright. See *Carter v. Gallagher*, 452 F.2d 315 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972); *Boudreaux v. Baton Rouge Marine Contracting Co.*, 437 F.2d 1011 (5th Cir. 1971); *Parham v. Southwestern Bell Tel. Co.*, 433 F.2d 421 (8th Cir. 1970); *Jones v. Lee Way Motor Freight, Inc.*, 431 F.2d 245 (10th Cir. 1970), *cert. denied*, 401 U.S. 954 (1971); *United States v. Sheet Metal Workers Int'l Ass'n, Local Union No. 36*, 416 F.2d 123 (8th Cir. 1969); *United States v. Hayes Int'l Corp.*, 415 F.2d 1038 (5th Cir. 1969); *Cypress v. Newport News Gen. & Nonsectarian Hosp.*

natory labor market had relegated minorities to the lowest-paid, most menial positions, it was legally (and morally) indefensible for employers to attempt to attribute racial segregation in their workforces to minorities' own job preferences.

To counter the lack of interest argument, judges developed a doctrine that I will call the futility doctrine. This doctrine held that even if minorities had failed to apply in representative numbers, this did not signal any lack of interest in the work, but rather a sense of futility created by the employer's history of discrimination. The futility doctrine was first articulated in 1967, in *Cypress v. Newport News General & Nonsectarian Hospital Association*.⁸⁹ The plaintiffs sought to bring a class action claim alleging that the hospital was discriminating on the basis of race in admitting doctors to its medical staff. The hospital tried to defeat this claim by arguing that only two black doctors had ever applied for staff privileges and only four had testified that they were interested in obtaining such privileges. The Fourth Circuit rejected this defense, stating:

That so few Negro physicians have applied is no indication of a lack of interest, but indicates, we think, a sense of the futility of such an effort in the face of the notoriously discriminatory policy of the hospital, and may even reflect a fear of possible reprisals should they seek to attain their rights.⁹⁰

The court held in favor of the plaintiffs, concluding that their statistical evidence, coupled with the hospital's unexplained rejection of two qualified black doctors, created an inference of classwide discrimination that the hospital had failed to rebut.⁹¹

In *Cypress* there was no evidence that the hospital had ever adopted an open (or "overt") policy of excluding African-Americans. Thus, the court might have accepted the hospital's interpretation of the statistical evidence and attributed the historical absence of African-Americans to their own lack of interest in joining the hospital's staff.

Ass'n, 375 F.2d 648 (4th Cir. 1967); *United States v. Central Motor Lines*, 338 F. Supp. 532 (W.D.N.C. 1971); *United States v. Local No. 86, Int'l Ass'n of Bridgeworkers*, 315 F. Supp. 1202 (W.D. Wash. 1970), *aff'd*, 443 F.2d 544 (9th Cir.), *cert. denied*, 404 U.S. 984 (1971); *United States v. Plumbers Local 73*, 314 F. Supp. 160 (S.D. Ind. 1969). In the two remaining cases, plaintiffs won at least a partial victory. *See United States v. H.K. Porter Co.*, 491 F.2d 1105 (5th Cir. 1974) (vacating the district court's decision accepting the lack of interest explanation when at the court of appeals' prompting, the parties entered a consent decree that substantially revamped the company's hiring practices); *Castro v. Beecher*, 334 F. Supp. 930, 945 (D. Mass. 1971) (attributing minorities' low rate of application in part to their own lack of interest, but nonetheless ordering the defendant to submit a comprehensive recruiting plan designed to convince minorities that they were "not only welcome but eagerly sought"), *aff'd in part and rev'd in part on other grounds*, 459 F.2d 725 (1st Cir. 1972).

⁸⁹ 375 F.2d 648 (4th Cir. 1967).

⁹⁰ *Id.* at 653.

⁹¹ *See id.* at 654-55.

But the court took judicial notice that this hospital was only one among many that had long refused to admit black physicians and that in the context of this history, the concept of "choice" was an illusion.⁹²

Early courts applied the futility doctrine in a way that acknowledged the history of racial disadvantage in the labor market. Through their adoption of three approaches to evaluating evidence, the courts created an almost irrebuttable presumption that any failure by minorities to apply for more desirable jobs was due to the employer's own historically discriminatory practices. First, as in *Cypress*, judges allowed plaintiffs to prove historic discrimination through statistical evidence alone. If judges had required plaintiffs to prove the existence of a formal, overt system of racial exclusion, the futility doctrine would have been of limited use to plaintiffs. Many employers had implemented segregated systems through informal customs so deeply ingrained that they did not require being openly stated.⁹³ Courts acknowledged this phenomenon and attributed statistical disparities to past discrimination even where plaintiffs produced no "smoking gun" evidence of a facially discriminatory policy.⁹⁴

Second, courts imposed on employers with historically segregated workforces an affirmative duty to attract minority workers to formerly segregated jobs. This affirmative duty was implicit in the futility doctrine itself: if historically discriminatory employers could not defend present patterns of segregation by pointing to minorities' failure to apply, the employers were under a duty to eliminate the effects of their own past discrimination by taking steps to attract minority workers. Many courts imposed this affirmative duty explicitly, holding that employers were required to overcome their "reputations for discrimination" in the African-American community.⁹⁵ In other cases, the duty was triggered by the employer's use of an informal, word-of-mouth recruiting system, through which incumbent (white) employees

⁹² See *id.* at 653 nn.7 & 8.

⁹³ See Hill, *Myth-Making as Labor History: Herbert Gutman and the United Mine Workers of America*, 2 INT'L J. POL., CULTURE & SOC'Y 132, 136 n.* (1988).

⁹⁴ Of the 12 early race discrimination cases, at least six involved no proof that the employer had ever operated an overt system of racial discrimination. See *Carter v. Gallagher*, 452 F.2d 315, 323 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972); *Parham v. Southwestern Bell Tel. Co.*, 433 F.2d 421, 426-27 (8th Cir. 1970); *Jones v. Leeway Motor Freight*, 431 F.2d 245, 247 (10th Cir. 1970), *cert. denied*, 401 U.S. 954 (1971); *Cypress*, 375 F.2d at 653-55; *Castro v. Beecher*, 334 F. Supp. 930 (D. Mass. 1971), *aff'd in part and rev'd in part on other grounds*, 459 F.2d 725 (1st Cir. 1972); *United States v. Plumbers Local 73*, 314 F. Supp. 160, 161-63 (S.D. Ind. 1969).

⁹⁵ See, e.g., *United States v. Sheet Metal Workers Int'l Ass'n, Local Union No. 36*, 416 F.2d 123, 139 (8th Cir. 1969); *United States v. Central Motor Lines*, 338 F. Supp. 532, 551, 559-60 (W.D.N.C. 1971); *United States v. Local 86, Int'l Ass'n of Ironworkers*, 315 F. Supp. 1202, 1236 (W.D. Wash. 1970), *aff'd sub nom. United States v. Ironworkers Local 86*, 443 F.2d 544 (9th Cir.), *cert. denied*, 404 U.S. 984 (1971).

passed along job information to other (overwhelmingly white) prospective applicants.⁹⁶ Importantly, courts evaluated whether employers had fulfilled this affirmative duty with reference to results — and not merely good faith efforts. Employers often tried to exonerate themselves by claiming that after title VII took effect, they had made special efforts to recruit minorities into predominantly white jobs. Courts held that such efforts, however laudable, did not absolve employers from liability.⁹⁷ In cases after case, judges condemned employers' efforts for "fall[ing] short of what is necessary."⁹⁸

Third, the courts refused to individualize the problem of segregation. Employers tried to discredit the statistical proof by pointing to plaintiffs' failure to produce anecdotal evidence showing that individual minorities had been discriminatorily rejected or discouraged from applying. The courts concluded, however, that plaintiffs need not present individual victims of discrimination to refute the argument that minorities lacked interest in nontraditional work.⁹⁹ This approach followed from judges' recognition of the history of racial discrimination in the labor market. If a people's aspirations have been formed in the context of historical oppression, it is unreasonable (even cruel) to ask them to prove that they have not chosen their lot. Thus, courts presumed that if minorities had always had the same work opportunities as whites, they would not have chosen their own economic disenfranchisement.

Taken as a whole, this body of doctrine reflected a strong judicial commitment to the view that minorities' work aspirations posed no impenetrable barrier to their full integration into jobs traditionally reserved for whites. This commitment, in turn, reflected an under-

⁹⁶ Early courts were virtually unanimous in concluding that word-of-mouth recruiting systems were discriminatory because they built upon patterns of racial segregation in non-work realms to perpetuate segregation in the workplace. *See, e.g., Parham*, 433 F.2d at 427; *Sheet Metal Workers*, 416 F.2d at 139; *Central Motor Lines*, 338 F. Supp. at 551, 558, 561-62; *Ironworkers*, 315 F. Supp. at 1225-26, 1237; *Plumbers*, 314 F. Supp. at 163-64.

⁹⁷ *See, e.g., Parham*, 433 F.2d at 425, 429 (holding that although the telephone company had made progress in hiring blacks, the company was still liable and subject to continuing judicial supervision); *Central Motor Lines*, 338 F. Supp. at 549-50, 565-66 (holding that although the trucking company had made extensive efforts to recruit black clericals and had recently hired black applicants at a higher rate than whites, the company was still liable and subject to numerical goals and timetables).

⁹⁸ *Sheet Metal Workers*, 416 F.2d at 139; *accord Jones*, 431 F.2d at 248; *United States v. Hayes Int'l Corp.*, 415 F.2d 1038, 1044 (5th Cir. 1969); *Ironworkers*, 315 F. Supp. at 1235; *Plumbers*, 314 F. Supp. at 163-64.

⁹⁹ *See, e.g., Jones*, 431 F.2d at 247 ("True, no specific instances of discrimination have been shown. However, because of the historically all-white make-up of the Company's [job] category, it may well be that negroes simply did not bother to apply."); *Sheet Metal Workers*, 416 F.2d at 127 (same); *see also Carter v. Gallagher*, 452 F.2d 315 (8th Cir. 1971) (holding that presence of individual victims of discrimination is not required to justify numerical relief), *cert. denied*, 406 U.S. 950 (1972).

lying assumption that minorities' current work interests were neither permanent or inevitable, but rather only provisional preferences formed and expressed in the context of a historically racist workworld. If these work interests had been formed by employers' historically discriminatory practices, then they could also be altered through employers' persistent efforts. Courts universally pressed forward in the belief that employers could "persuade the doubtful and the skeptical that the discriminatory bars have been removed,"¹⁰⁰ and thus free minorities to aspire to work many had never before dreamed of being able to do.¹⁰¹ By acknowledging that people's work aspirations and identities are shaped in the context of what larger institutional and legal environments define as possible,¹⁰² early courts refused to allow employers to escape responsibility for the collective history of labor market discrimination by pinning the blame on its victims.¹⁰³

¹⁰⁰ *Sheet Metal Workers*, 416 F.2d at 139.

¹⁰¹ The Fifth Circuit's decision in *Morrow v. Crisler*, 491 F.2d 1053 (5th Cir. 1974) (en banc), illustrates this perspective. The court held that the relief granted by the district court was inadequate to eliminate the effects of the Mississippi Highway Patrol's long-standing history of racial discrimination. The Patrol attempted to excuse its record by arguing that it had hired every qualified black person who had applied to be a patrol officer. Rejecting this explanation, the court stated that "[i]f this be true, it is apparent that either the qualifications are discriminatory in effect, or the State has not conducted a sufficient recruitment campaign to enlist blacks who meet those requirements." *Id.* at 1055-56. The court added:

[We] are not sanguine enough to be of the view that benign recruitment programs can purge in two years a reputation which discriminatory practices of approximately 30 years have entrenched in the minds of blacks in Mississippi. . . . Imaginative initiative is needed from all present members of the Highway Patrol.

Id. at 1056-57.

¹⁰² For three eloquent descriptions of how law can express and expand the aspirations of disempowered groups, see Hartog, *The Constitution of Aspiration and "The Rights That Belong to Us All,"* in *THE CONSTITUTION AND AMERICAN LIFE* 353 (D. Thelen ed. 1988); Schneider, *The Dialectic of Rights and Politics: Perspectives From the Women's Movement*, 61 N.Y.U. L. REV. 589 (1986); and Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401 (1987).

¹⁰³ This early race discrimination law may, however, have taken sex segregation as a given. Most of the cases involved jobs held by white men, and the courts probably did not envision women of color as victims among those who had been discriminatorily denied these jobs. In one case the Second Circuit vacated a 30% hiring goal because it was based on the entire population of minorities in the local area, and thus included minority women. Noting casually that "women have never sought to become steamfitters," the court held: "Absent racial discrimination, . . . the non-white members of the Union would have been drawn from the male workforce over 18 years of age in the Union's jurisdiction." *Rios v. Enterprise Ass'n Steamfitters Local 638*, 501 F.2d 622, 632 (2d Cir. 1974) (emphasis added). In other cases, minority women are mentioned only in connection with clerical jobs. See, e.g., *United States v. Central Motor Lines*, 338 F. Supp. 532, 548-52 (W.D.N.C. 1971).

A burgeoning new literature discusses other examples of the legal "erasure" of women of color. See, e.g., Austin, *Sapphire Bound!*, 1989 WIS. L. REV. 539; Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139; Scales-Trent, *Black Women and the Constitution: Finding Our Place: Asserting Our Rights*, 24 HARV. C.R.-C.L. L. REV. 9 (1989).

B. Sex Discrimination Cases

In sex discrimination cases raising the lack of interest argument, the courts have used a different interpretive framework from the one used in the early race discrimination cases. This section traces the framework for interpreting sex segregation. I draw on quantitative analyses of the outcomes and evidence in the aggregate group of sex discrimination cases¹⁰⁴ as well as close readings of illustrative cases.

1. *The Success and Significance of the Lack of Interest Argument.*—Despite the publicity it generated, the outcome of the *Sears* case was not unusual. Table 1 illustrates this point, showing the parties' success rates on the lack of interest argument in sex discrimination cases over time.¹⁰⁵

TABLE 1:
HISTORICAL SUCCESS RATES ON THE LACK OF INTEREST ARGUMENT

| | Early period 1972-77 | Modern period 1978-89 | Both periods 1972-89 |
|--------|-------------------------|--------------------------|-------------------------|
| P Wins | 6 (54.5%) | 25 (58.1%) | 31 (57.4%) |
| D Wins | 5 (45.5%) | 18 (41.9%) | 23 (42.6%) |
| Total | 11 (100.0%) | 43 (100.0%) | 54 (100.0%) |

In the entire period from 1972 to 1989, plaintiffs have prevailed on the interest issue in 57.4% of the claims in connection with which

¹⁰⁴ Throughout this section I report the results from tests of statistical significance. Because my search strategy was designed to locate every published decision that addressed the lack of interest argument, the collection of claims in my study approximates a universe rather than a sample. Strictly speaking, it is unnecessary to test for statistical significance of the relationship between variables in a universe, as opposed to a sample, of cases. I report p-values, however, to give the reader some sense of the relative importance of the variables under consideration. The p-values may be particularly useful in connection with the analyses which show the relationship between case outcomes and certain types of evidence. A p-value of .05 or less means that the probability that the outcomes would have differed as much as they did across cases where that evidence was present and absent, by chance alone, is one in 20 or less. Similarly, a p-value of .10 or less shows that the same probability is one in 10 or less.

The reported p-values were calculated using chi-square tests, unless the numbers were too small. Where any of the expected cell values in the contingency table was less than five, a Yates correction was used. Where the total size of the sample was less than 20, a Fisher's Exact Test was used. For a very readable description of these tests, see W. MENDENHALL, L. OTT & R. LARSON, *STATISTICS: A TOOL FOR THE SOCIAL SCIENCES* 321-36 (1974).

¹⁰⁵ The early period begins in 1972, when the first sex discrimination case raising the lack of interest argument was decided, and continues through 1977, when the Supreme Court decided *Teamsters, Dothard*, and *Hazelwood*. The modern period spans from 1978 through 1989, when the last sex discrimination case in my data set was decided.

it has been asserted.¹⁰⁶ Thus, almost half the courts considering the issue have attributed sex segregation to women's own work preferences. In addition, outcomes have remained relatively stable over time,¹⁰⁷ which suggests that the lower courts have not altered their approach in response to the Supreme Court's 1977 decisions in *Teams-ters*, *Dothard*, and *Hazelwood*.

Whether one views plaintiffs' victory rate as high or low depends on one's expectations and standards for comparison.¹⁰⁸ There are few other studies of outcomes in employment discrimination cases with which to compare these results.¹⁰⁹ Challenges to workplace segregation, however, go to the core of what we think of as title VII's protection against sex discrimination.¹¹⁰ Indeed, it is difficult to imag-

¹⁰⁶ The outcomes vary only slightly in individual as opposed to classwide claims of discrimination. Plaintiffs prevailed on the lack of interest argument in 50% (four out of eight) of the individual claims and in 58.7% (27 out of 46) of the classwide claims ($p = 1.0$).

¹⁰⁷ $p = 1.0$.

¹⁰⁸ Some theoretical work in the sociology of law predicts that disadvantaged groups will tend to lose legal confrontations with powerful groups having greater resources and better organizational capability. The classic article is Marc Galanter's *Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974). Other models of litigation predict that under certain conditions, plaintiffs will win approximately 50% of all cases tried to judgment, regardless of whether the legal standard is favorable or unfavorable to them. See, e.g., Priest & Klein, *supra* note 71, at 4-5. This work suggests caution in interpreting plaintiffs' success rates in tried cases as evidence of the favor or disfavor with which they are treated by the legal system, because these success rates do not reveal how the parties fared in cases settled before trial. See *id.* For an empirical study examining the extent to which these models explain success rates in employment discrimination litigation, see Eisenberg, cited above in note 83.

¹⁰⁹ In the only comprehensive study of employment discrimination cases that reports separate results for sex discrimination cases, Burstein found that plaintiffs won at least a partial victory in 58% percent of the 672 cases decided by federal appellate courts and published in the Fair Employment Practices Reporter between 1963 and 1985. See Burstein, *supra* note 80, at 655-57; see also Mills, *supra* note 75, at 206 (finding that plaintiffs won 32% of all sex-based employment discrimination cases decided by federal district courts in five circuits between 1967 and 1975); cf. Eisenberg, *supra* note 83, at 1578 (finding that plaintiffs won 22% of employment discrimination cases decided by the federal district courts between 1978 and 1985, but reporting no separate results for sex discrimination cases). For a more detailed comparison of success rates in race and sex discrimination cases raising the lack of interest argument in various historical periods, see V. Schultz & S. Petterson, cited above in note 85, at 38-52.

¹¹⁰ Those who spoke in favor of the amendment adding the prohibition against sex discrimination to the original 1964 Act focused primarily on the injustice of sex segregation in the labor market. See, e.g., 110 CONG. REC. 2579-80, 2580-81 (1964) (remarks of Reps. Griffiths and St. George). Moreover, when Congress amended title VII in 1972, both the House and the Senate made clear that they considered sex segregation to be the primary evil that the statute was designed to address. See H.R. REP. No. 92-238, 92d Cong., 1st Sess. 4-5, reprinted in 1972 U.S. CODE CONG. & ADMIN. NEWS 2137, 2140 [hereinafter HOUSE REPORT] ("[W]omen are placed in the less challenging, the less responsible and the less remunerative positions on the basis of their sex alone. Such blatantly disparate treatment is particularly objectionable in view of the fact that Title VII has specifically prohibited sex discrimination since its enactment in 1964."); S. REP. No. 415, 92nd Cong., 1st Sess. 7 (1971) [hereinafter SENATE REPORT] (including similar statements).

ine what title VII's prohibition against sex discrimination *was* intended to cover if not the relegation of women to lower-paid, lower-status, dead-end jobs.¹¹¹ If dismantling sex segregation is at the heart of title VII's protection of women, the success of the lack of interest defense is directly counter to that vision. This defense is virtually never supported by direct evidence. Instead, employers who assert it ask courts to make broad assumptions about women as a group with respect to an intangible quality that eludes objective measurement (their "interest" in the work).¹¹² Thus, courts embracing the lack of interest explanation seem to engage in precisely the sort of undocumented generalizations about women that title VII was designed to prohibit.¹¹³

Employers have been willing not only to advance this justification, but also to state it in the most blatant form possible. They have framed the lack of interest argument in two different ways. In the weaker form of the argument (the "lack of applicants" argument), the employer asserts only that women have underapplied, leaving the court to fill in the unstated assumption that women have failed to apply because they lack interest in the work.¹¹⁴ In the stronger form,

¹¹¹ Even those who take the position that title VII should not be interpreted to require pay equity argue that the way to eliminate the male-female wage disparity is to enforce title VII and the Equal Pay Act of 1963, 29 U.S.C. § 206(d) (1982), vigorously to ensure that women are integrated into nontraditional jobs and that they are paid the same as men in those jobs. See, e.g., *American Nurses' Ass'n v. Illinois*, 783 F.2d 716, 730 (7th Cir. 1986); Abram, *Concurring Statement of Morris B. Abram*, in U.S. COMM'N ON CIVIL RIGHTS, COMPARABLE WORTH: AN ANALYSIS AND RECOMMENDATIONS 76, 77 (1985) [hereinafter COMPARABLE WORTH]; Pendleton, *Concurring Statement of Clarence Pendleton, Jr.*, in COMPARABLE WORTH, *supra*, at 73, 75.

¹¹² Employers sometimes try to substantiate the lack of interest argument with data showing that women have underapplied for the work relative to their representation in the relevant labor market. But as *Dothard*, *Teamsters*, and the early race discrimination cases teach, applicant data do not "prove" anything about women's relative interest in the work. One needs to know why women were less likely than men to apply.

¹¹³ The only other defense that draws on these sorts of broad generalizations is the bona fide occupational qualification (BFOQ) defense permitted under § 703(e) of title VII, 42 U.S.C. § 2000e-2(e) (1982). With the BFOQ defense, the employer seeks to justify an overt policy of excluding all women by proving that "all or substantially all women would be unable to perform safely and efficiently the duties of the job involved," *Weeks v. Southern Bell Tel. & Tel. Co.*, 408 F.2d 228, 235 (5th Cir. 1969), or that "the essence of the business operation would be undermined by not hiring members of one sex exclusively." *Diaz v. Pan Am. World Airways*, 442 F.2d 385, 388 (5th Cir. 1971) (emphasis in original), *cert. denied*, 404 U.S. 950 (1971); accord *Dothard v. Rawlinson*, 433 U.S. 321, 333 (1977) (citing both the *Weeks* and *Diaz* formulations approvingly). Although there are no studies showing how often employers succeed in establishing the BFOQ defense, the perception is that the courts have accepted it only infrequently. See, e.g., B. SCHLEI & P. GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* 341, 353 (2d ed. 1983). Courts have held that the BFOQ defense is to be interpreted narrowly precisely because it draws upon the sort of broad generalizations about women that title VII was intended to prohibit. See, e.g., *Dothard*, 433 U.S. at 333-34; *Diaz*, 442 F.2d at 387; *Weeks*, 408 F.2d at 235.

¹¹⁴ See, e.g., *Piva v. Xerox Corp.*, 654 F.2d 591, 595 (9th Cir. 1981); *Hill v. Western Elec.*

however, the employer states explicitly that women are not interested in nontraditional work and that they actually prefer lower-paid, lower-status, traditionally female jobs.¹¹⁵ Although both forms of the argument are premised on the same set of assumptions, there is a rhetorical distinction between the two. In its weaker form, the argument masquerades as a mere observation of statistical "fact": "We don't know why, but women simply aren't applying for this work." But in its stronger form, the argument is cast in terms of an almost ontological description of the "reality" of women's nature: "Women prefer traditional over nontraditional jobs, and (of course) we know why. It's because they are women."

One might have expected employers to prefer the weaker form, since it obscures the appeal to generalizations about the intrinsic preferences of "women as a group." But in the overwhelming majority of cases — 79.6% (forty-three out of fifty-four) of the claims in my study — employers framed the argument in its stronger form. Furthermore, judges have not penalized employers for making the argument in its stronger form. Courts accepted the argument in 41.9% (eighteen out of forty-three) of the cases in which employers framed it in the stronger form, and in 45.5% (five out of eleven) of the cases in which employers framed it in the weaker form.¹¹⁶ Thus, employers have had little to fear in arguing openly that women have chosen their own economic disenfranchisement.¹¹⁷

Whatever the form in which it is framed, the lack of interest argument is of central importance in the cases in which it is raised.

Co., 12 Fair Empl. Prac. Cas. (BNA) 1175, 1179-80 (E.D. Va. 1976), *rev'd on other grounds*, 596 F.2d 99 (4th Cir.), *cert. denied*, 444 U.S. 929 (1979).

¹¹⁵ See, e.g., *EEOC v. Sears, Roebuck & Co.*, 628 F. Supp. 1264, 1305 (N.D. Ill. 1986), *aff'd*, 839 F.2d 302 (7th Cir. 1988); *EEOC v. Mead Foods, Inc.*, 477 F. Supp. 1, 3 (W.D. Okla. 1977); *Logan v. General Fireproofing Co.*, 6 Fair Empl. Prac. Cas. (BNA) 140, 144 (W.D.N.C. 1972).

¹¹⁶ p = 1.0.

¹¹⁷ Indeed, in *Sears*, defense lawyer Charles Morgan went so far as to argue in his summation that it is ridiculous to suggest that sex discrimination even exists. "Strange, isn't it," said Morgan, "that we live in a world where there is supposed to be a monopoly of white men who somehow get up every morning trying to find a way to discriminate against their wives, their daughters, their mothers, their sisters." Closing Argument, Trial Transcript at 19,064, *EEOC v. Sears, Roebuck & Co.*, 628 F. Supp. 1264 (N.D. Ill. 1986) (No. 79-C-4373). Of course, if sex discrimination does not exist, it follows that women have chosen their lot in life, including their "place" at work.

That many judges have condoned such arguments suggests that they may share with employers and defense attorneys the dominant cultural image of women as marginal workers. As a counter-vision, one can imagine a world in which judges would consider employers' willingness to argue that women "choose" to segregate themselves into the lowest-paying, most menial jobs as itself evidence of a sexually discriminatory attitude. Cf. *Arnold v. Ray*, 21 Fair Empl. Prac. Cas. (BNA) 793, 795 (N.D. Ohio 1979) (finding that the "most telling piece of evidence" of intentional discrimination was the mayor's own testimony that blacks "don't want to be policeman[n]").

As Table 2 shows,¹¹⁸ success on the interest issue is significantly associated with success on the underlying sex discrimination claim.¹¹⁹

TABLE 2:
THE RELATION BETWEEN SUCCESS ON THE LACK OF INTEREST
ARGUMENT AND SUCCESS ON THE UNDERLYING CLAIM

| | P wins on interest argument | D wins on interest argument | Total |
|----------------------------------|-----------------------------------|-----------------------------------|-------------|
| P wins on underlying claim | 28 (90.3%) | 0 (0.0%) | 28 (51.9%) |
| D wins on underlying claim | 0 (0.0%) | 20 (87.0%) | 20 (37.0%) |
| Neither party wins | 3 (9.7%) | 3 (13.0%) | 6 (11.1%) |
| Total | 31 (100.0%) | 23 (100.0%) | 54 (100.0%) |

The results in the third column are not surprising. Because the lack of interest explanation is a complete defense to liability, plaintiffs cannot win their sex discrimination claims unless they prevail on the interest issue. In addition, the second column shows that there was not a single instance in which plaintiffs won on the interest issue but lost on the underlying claim. This result is surprising, because the lack of interest argument is only one defense employers might advance to justify women's underrepresentation. Perhaps many employers (and their lawyers) did not seriously investigate any alternative explanations, because dominant cultural norms had so deeply shaped their views that it did not occur to them to view sex segregation as anything

¹¹⁸ The "neither party wins" category includes four cases in which the court of appeals remanded the underlying claim to the trial court for further consideration so that neither party achieved a clear victory, as well as two cases in which the interest issue was raised during the remedial phase of the litigation so that the discrimination claim was no longer at issue. In the two remedy cases, the employers urged women's lack of interest in an attempt to persuade the courts that there was no need to impose numerical relief. *See United States v. Virginia*, 22 Fair Empl. Prac. Cas. (BNA) 936, 939 (E.D. Va. 1978); *Jordan v. Wright*, 417 F. Supp. 42, 45 (M.D. Ala. 1976).

¹¹⁹ $p = .0000$.

other than the expression of women's own choice.¹²⁰ Whatever the explanation, the centrality of the lack of interest argument in these cases is clear. The contest over the legality of segregation focuses on the struggle over its interpretation.

2. *The Relation Between Three Types of Evidence and the Success of the Lack of Interest Argument.* — If some courts have attributed sex segregation to employer "coercion" and others have attributed it instead to women's own "choice," how have judges decided which of these two competing explanations to adopt in particular cases? In ruling on any legal issue, courts consider the evidence introduced by the parties. Judges' evaluations of the evidence — their assessments of what types of evidence are more and less probative of the issue — create the legal framework for analyzing that issue. In the sections that follow, I examine how judges have evaluated the three major types of evidence presented in connection with the lack of interest issue. First, there is plaintiffs' evidence that the employer discriminated in the past, before the liability period began ("evidence of past discrimination"). Second, there is employers' evidence that they made special efforts to attract women to nontraditional work ("evidence of special efforts"). Third, there is plaintiffs' evidence that the employer discriminatorily rejected individual women or discouraged them from even applying ("anecdotal evidence"). Although these three types of evidence were also central to judicial discussion in the early race discrimination cases, judges have responded to this evidence differently in sex discrimination cases. Through their responses, the courts have drawn the boundaries between the coercion and choice explanations for sex segregation in a way that limits title VII's capacity to address it.

(a) *Evidence of Past Employer Discrimination.* — Drawing on the early race discrimination doctrine, plaintiffs in sex discrimination have tried to place women's "interest" in nontraditional work within the larger context of historical employer discrimination. In almost two-thirds of the cases — 64.8% (thirty-five out of fifty-four) of the claims in my study — plaintiffs presented evidence suggesting that the employer had discriminatorily segregated jobs by sex before the liability period began. In doing so, plaintiffs hoped to invoke the futility

¹²⁰ This is only one possible explanation for the observed pattern. In some cases, it may be that there simply were no plausible alternative explanations for women's underrepresentation; pre-trial discovery may have shown, for example, that the women were as well qualified as the men. In other cases, employers may have asserted defenses other than women's lack of interest, but the same evidence and attitudes that led courts to reject the interest argument led them to reject the alternative explanations as well. See, e.g., *Kilgo v. Bowman Transp. Co.*, 570 F. Supp. 1509, 1517, 1526–28 (N.D. Ga. 1983) (rejecting the lack of qualifications defense on the ground that the company's experience requirement was a pretext for discrimination intended to discourage females from applying, and finding that this and other evidence of discouragement also invalidated the lack of interest defense), *aff'd*, 789 F. 2d 859 (11th Cir. 1986).

doctrine, which attributes protected class members' failure to pursue historically segregated jobs to a sense of futility created by the employers' past discrimination, rather than to a lack of interest.

In sex discrimination cases, however, evidence of past discrimination has not led courts to apply the futility doctrine, as Table 3 illustrates.

| TABLE 3: THE RELATION BETWEEN EVIDENCE OF PAST DISCRIMINATION AND THE SUCCESS OF THE LACK OF INTEREST ARGUMENT | | |
|--|------------------------------------|---------------------------------------|
| | Evidence of past discrimination | No evidence of past discrimination |
| P wins | 17 (48.6%) | 14 (73.7%) |
| D wins | 18 (51.4%) | 5 (26.3%) |
| Total | 35 (100.0%) | 19 (100.0%) |

Plaintiffs have been no more likely to persuade judges to reject the lack of interest argument in cases in which they presented evidence of past discrimination than in cases in which they did not.¹²¹ In fact, the opposite was true. Plaintiffs were less likely to win on the interest issue when they introduced evidence of past discrimination than when they introduced no such evidence. This result is the opposite of the one we would expect if courts had relied on the futility doctrine to reject the lack of interest argument.

One might speculate that plaintiffs were more successful in cases in which they did not present evidence of past discrimination because in such cases, they were more likely to introduce other evidence more favorable to them, such as anecdotal evidence that the employer discriminated during the more recent liability period. Alternatively, one might speculate that plaintiffs were less successful in cases involving evidence of past discrimination because employers who had discriminated historically were more likely to have compensated for their past records by making special efforts to attract women during the more recent period. Although either of these speculations might explain why evidence of past discrimination did not increase plaintiffs' likelihood of winning, neither is borne out by data. Regardless of whether plaintiffs introduced anecdotal evidence of discrimination and regardless of whether employers introduced evidence of special efforts,

¹²¹ $p = .07$.

plaintiffs remained no more likely to win in cases in which they presented evidence of past discrimination than in cases in which they did not.¹²²

How, then, are we to explain why evidence of past employer discrimination has not helped plaintiffs persuade courts to reject the lack of interest argument? Part of the answer lies in the *type* of evidence presented to prove past discrimination. Courts have been far less willing to find that employers engaged in past discrimination from statistical evidence than from direct or anecdotal evidence suggesting the same history.¹²³ Furthermore, there is a strong association between judges' willingness to infer past discrimination from statistical evidence and their willingness to attribute present patterns of segregation to discrimination. Whereas all of the judges who were willing to infer past discrimination from statistical evidence alone rejected the lack of interest argument, almost all of those who refused to make such a finding from statistical proof accepted that argument.¹²⁴

¹²² The relationship between evidence of past discrimination and outcome observed in Table 3 remains even after controlling for the presence or absence of anecdotal evidence of discrimination. In cases in which anecdotal evidence was introduced, plaintiffs won only 61.9% (13 out of 21) of the cases in which they presented evidence of past discrimination, compared to 81.8% (nine out of 11) of the cases in which they did not. Similarly, in cases in which no anecdotal evidence was introduced, plaintiffs won only 28.6% (four out of 14) of the cases in which they presented evidence of past discrimination, compared to 62.5% (five out of eight) of the cases in which they did not.

The relationship between evidence of past discrimination and outcome in Table 3 also remains after controlling for the presence or absence of evidence of special efforts. In cases in which evidence of special efforts was introduced, plaintiffs won only 28.6% (four out of 14) of the cases in which they presented evidence of past discrimination, compared to 71.4% (five out of seven) of the cases in which they did not. Similarly, in cases in which no evidence of special efforts was introduced, plaintiffs won only 61.9% (13 out of 21) of the cases in which they presented evidence of past discrimination, compared to 75.0% (nine out of 12) of the cases in which they did not.

These analyses do not control for possible interaction among all three types of evidence. A separate logistic regression analysis showed, however, that even after controlling simultaneously for anecdotal evidence and evidence of special efforts, evidence of past discrimination still decreased plaintiffs' likelihood of winning. The T-ratio for the evidence of past discrimination variable was -1.837, with a corresponding p-value of .07.

¹²³ Of the 11 claims for which plaintiffs presented direct or anecdotal evidence of past discrimination, the courts found in all 11 (100%) that the employer had engaged in past discrimination. But of the 24 claims for which plaintiffs relied on statistical evidence alone, courts found in only 11 (45.8%) that the employer had engaged in past discrimination ($p = .0069$).

Statistical evidence of past discrimination is no different from statistical evidence of current discrimination, except that it covers the time preceding the liability period. Typically, the plaintiff will show that, until a certain date, the employer hired no women at all (or only a few women) for nontraditional jobs.

¹²⁴ More precisely, all 11 (100%) of the courts who inferred past employer discrimination from statistical evidence alone rejected the interest argument, and 12 out of 13 (92.3%) of those who refused to infer past discrimination from statistical evidence accepted that argument ($p = .0000$).

Evidence of past discrimination has not helped sex discrimination plaintiffs partly because conservative¹²⁵ courts have refused to attribute to past employer discrimination even egregious, long-standing patterns of sex segregation revealed by statistical evidence. Instead, conservative courts have interpreted these historical patterns as the expression of women's own past "choices" — just as they interpret present patterns as the expression of women's current "choices." In *EEOC v. Mead Foods, Inc.*,¹²⁶ for example, the EEOC sued a Southwestern company whose five bakeries were highly segregated by sex. The statistical evidence showed that this segregation reached far into the past. In eighty percent of its entry-level jobs, the company had never employed any women (or had employed only a few).¹²⁷ The company had hired women instead for its lower-paid, heavily female jobs. When the company tried to justify these disparities by arguing that women had always found the higher-paying jobs unappealing,¹²⁸ the court accepted this explanation, stating: "[C]ommon practical knowledge tells us that certain work in a bakery operation is not attractive to females. *This is a fact of life that an Act of Congress cannot overcome . . .*"¹²⁹

Similarly, *EEOC v. Korn Industries*¹³⁰ involved a South Carolina furniture manufacturer whose workforce was highly segregated by sex and race. Based on the statistical evidence alone, the court had little trouble concluding that the company was discriminating on the basis of race.¹³¹ The court refused, however, to draw an inference of sex discrimination from similar evidence showing a long-standing pattern of sex segregation.¹³² The judge attributed this pattern instead to women's own historical preferences, stating: "There has been no showing that any female has ever wanted to work for the Hardwood Division. . . . Although the plaintiff may call this stereotype female classification, the Court has not seen females clamoring to work in such jobs" ¹³³

¹²⁵ I use the term "conservative" here to refer generally to courts that have accepted the lack of interest argument. I also use it more specifically here to refer to courts that refused to infer past employer discrimination from statistical evidence. Although not all courts that accepted the interest argument were presented with statistical evidence of past discrimination, part of what leads courts to attribute present patterns of segregation to women's choice is a vision of an uninterrupted history in which women have always been free to choose whatever work they wanted.

¹²⁶ 466 F. Supp. 1 (W.D. Okla. 1977).

¹²⁷ *Id.* at 3-4.

¹²⁸ *Id.* at 2-3.

¹²⁹ *Id.* at 3 (emphasis added).

¹³⁰ 17 Fair Empl. Prac. Cas. (BNA) 954 (D.S.C. 1978), *aff'd on other grounds and remanded*, 662 F.2d 256 (4th Cir. 1981).

¹³¹ *See id.* at 959.

¹³² The company had never hired a single woman for its hardwood division and had employed women in only five of nine job categories in its cabinet division. *See id.* at 958.

¹³³ *Id.* at 959. The court's refusal to find sex discrimination is particularly disturbing because

Given that the employers in *Mead* and *Korn* had *never* hired women for nontraditional jobs, the courts in both cases could easily have found that both employers had engaged in past discrimination. The courts could then have invoked the futility doctrine to reject the employers' suggestions that women's failure to pursue the jobs was attributable to some timeless set of "feminine" preferences unrelated to their historical experience of discrimination. That these and other conservative courts were unwilling to take this approach reveals their view of the history of women's experience in the labor market. They were not only hostile to, but also incredulous at, the suggestion that sex segregation exists because employers have historically imposed it on women.

While conservative courts have refused to recognize the history of sex discrimination in the labor market, even more liberal¹³⁴ courts who have acknowledged this history have not relied on the futility doctrine to counter the lack of interest argument. Although courts rejected the interest argument in sixteen of the twenty-two cases in which they found past employer discrimination, few of these courts drew on the employer's past record to explain women's present failure to apply.¹³⁵ Indeed, in most of these cases, judges seemed to mention the employer's history of discrimination only in passing.

Liberal courts recognize that employers historically discriminated against women, but they are skeptical that past generations of women would have wanted to work in nontraditional jobs even if employers had permitted them to do so. In *Capaci v. Katz & Besthoff, Inc.*,¹³⁶ for example, the Fifth Circuit first concluded that a Louisiana drug-

the EEOC had alleged not only that the company was segregating its jobs by race and sex, but also that it was discriminating specifically against black women. *See id.* at 955. The court's rulings prohibited the company from denying black men access to the higher-graded jobs held by white men, but they left the company free to exclude black (and other) women from the same jobs.

¹³⁴ I am using the term "liberal" here to refer to courts who have rejected the lack of interest argument, as I do throughout the Article. As shown earlier, though, there is a significant relationship between judges' willingness to reject the lack of interest explanation and their willingness to infer past employer discrimination from statistical evidence alone. *See supra* note 124 and accompanying text.

¹³⁵ Only one court has explicitly invoked the principle that an employer has an affirmative duty to correct for past discrimination by attracting women to the jobs from which they formerly had been excluded. *See Chrapliwy v. Uniroyal, Inc.*, 458 F. Supp. 252, 262 (N.D. Ind. 1977). In a few additional cases, courts did not invoke this affirmative duty, but nonetheless seemed to place women's current interest in nontraditional jobs in the context of the employer's historical discrimination. *See Harless v. Duck*, 619 F.2d 611, 618 (6th Cir.) ("[The police department's] policies had been engraved in stone since the 1920's. Every woman on the police force and every woman interested in becoming a member of [the force] knew her restricted role."), *cert. denied*, 449 U.S. 872 (1980); *Thompson v. Boyle*, 499 F. Supp. 1147, 1150, 1161-62 (D.D.C. 1979) (citing the history of sex discrimination in the bookbinder industry to explain women's diminished interest in the craft), *aff'd sub nom. Thompson v. Sawyer*, 678 F.2d 257 (D.C. Cir. 1982).

¹³⁶ 711 F.2d 647 (5th Cir. 1983), *cert. denied*, 466 U.S. 927 (1984).

store chain had discriminatorily denied women managerial positions between 1965 and 1972.¹³⁷ Emphasizing that the drugstore had placed male-only advertisements for managers, the court held that the company's assertion that women lacked interest in management could not excuse its failure to hire a single woman during this early period.¹³⁸ In a second ruling, however, the court accepted the same lack of interest argument to justify women's continuing underrepresentation from 1973 to 1977.¹³⁹ Remarkably, the court failed even to discuss whether the company's proven history of discrimination might have dissuaded women from seeking management jobs during the more recent period. Apparently the judges did not really believe that many women would have aspired to management even if the drugstore had always welcomed them.¹⁴⁰ Thus, when the company lifted the formal barriers and hired a few token women, the court was all too ready to assume that women's historical disinclination toward responsible, upper-level jobs accounted for the remaining disparity.

Similarly, in *Catlett v. Missouri Highway & Transportation Commission*,¹⁴¹ the statistical evidence showed that, until 1976, the state of Missouri had never hired a single woman for its road "maintenance" job and women in the local labor force continued to be significantly underrepresented.¹⁴² When the state argued that this evidence was insufficient to establish discrimination because few women had expressed interest in the job by applying, the Eighth Circuit rejected this defense and held that the district court had properly refused to rely on applicant data.¹⁴³ In analyzing the issue, however, the court failed to mention that the state's long history of excluding women may have discouraged them from applying for road maintenance work.¹⁴⁴ Furthermore, the Eighth Circuit vacated the

¹³⁷ See *id.* at 662.

¹³⁸ See *id.* at 653, 660-61. The company tried to excuse its sexually discriminatory advertising by emphasizing that a female personnel officer had placed the ads and that she had not intended to discriminate against women. When asked at trial why she placed the ads in the male-only section of the newspaper, the personnel manager replied: "Well, that was because managers were always males. So, I put it in the male column." *Id.* at 660.

¹³⁹ Between 1973 and 1977, women were only 9.2% of those the company hired as managers. See *id.* at 652. By the Fifth Circuit's own account, "[t]he results of [plaintiff's statistical] tests . . . consistently showed the probability of such disparate hiring occurring by chance to be less than one in 10,000." *Id.*

¹⁴⁰ Indeed, the court emphasized that the company had hired *zero* women during the early 1965-1972 period, and observed that hiring even two or three women would have gone a long way toward showing the company's "willingness to consider women as equals in firm management." *Id.* at 662.

¹⁴¹ 828 F.2d 1260 (8th Cir. 1987), *cert. denied*, 485 U.S. 1021 (1988).

¹⁴² See *Catlett v. Missouri Highway & Transp. Comm'n*, 589 F. Supp. 929, 933-34 (W.D. Mo. 1983), *aff'd in part and rev'd in part on other grounds*, 828 F.2d 1260 (8th Cir. 1987), *cert. denied*, 485 U.S. 1021 (1988).

¹⁴³ See *Catlett*, 828 F.2d at 1266.

¹⁴⁴ Evidence in the record directly tied the low number of female applicants to the state's

district court's award of numerical relief, holding that the state's past record failed to justify such relief and concluding that there was no need for the trial court even to maintain jurisdiction to ensure that the state ceased its discriminatory practices.¹⁴⁵ The court of appeals seemed to believe that once the plaintiffs had made the state aware of women's interest in road maintenance jobs, Missouri would voluntarily place women in those jobs without any judicial supervision.¹⁴⁶

There is a distinction in the historical sensibilities of conservative and liberal courts, but it is a distinction without a difference. In the conservative approach, women have always had a timeless set of "feminine" attributes that include a preference for traditionally female work. This conservative vision is ultimately ahistorical, for history reveals only the expression of an unchanging "truth" that gender and gendered work aspirations are so deeply ingrained that they may be considered part of human nature. The liberal approach is more complex. Even apparently sympathetic liberal judges who reject the idea that contemporary women "choose" female-dominated work have been unwilling to abandon the notion that women of the past did "choose" such work. The liberal approach thus rests on a story of historical progress that imagines a "modern" woman who has emerged only since the passage of title VII and whose aspirations for nontraditional work represent a sharp break from those of most women in the past. Unlike the conservative vision, the liberal one is not completely ahistorical, for it acknowledges implicitly that human consciousness is subject to historical influences and change. But it attributes the historical change in women's work aspirations not to changed labor market conditions, but rather to other, unspecified "societal" influences.

The liberal approach ultimately converges with the conservative one for title VII purposes. Neither clearly acknowledges the influence of historical labor market discrimination on the formation of working women's job aspirations.¹⁴⁷ Conservatives and liberals alike have

historical hiring practices. With each additional woman hired, the state experienced an increase in applications from women. In 1975, before the state had hired a single woman as a road maintenance worker, only nine women applied for the job. In 1976, when the state hired its first woman, the number of women applicants rose to 16. In 1977, when the State hired two more women, the number of women applicants rose to 55. In 1978, when the State hired five more women, the number of women applicants rose to 120. See *Catlett*, 589 F. Supp. at 934.

¹⁴⁵ See *Catlett*, 828 F.2d at 1268-69.

¹⁴⁶ The district court had explicitly rejected this position: "While defendants argue that their voluntary efforts in changing their hiring practices are enough to preclude additional affirmative relief, the Court finds the long history of discrimination and the comparatively short history of attempts to end such discrimination warrant further measures" *Catlett*, 589 F. Supp. at 1020.

¹⁴⁷ Indeed, one cannot always distinguish clearly between the two approaches in judicial decisions. There is slippage between the view that women aspire to "women's work" because

found implausible the proposition that sex segregation exists because employers have historically reserved higher-paying jobs for men and restricted women to lower-paying, less desirable jobs. It is unclear why judges have adopted this view, for it denies the primary reason women needed title VII's protection. The history of employer discrimination relegating women to female-dominated jobs is well documented.¹⁴⁸ Furthermore, although the prohibition against sex discrimination began with an inauspicious "story of origins"¹⁴⁹ — the popular perception of the congressional motivation for adding it to the original 1964 bill is that it was a "joke," a last-ditch effort by opponents to defeat the legislation¹⁵⁰ — Congress made clear when it amended title VII in 1972 that sex segregation is a serious form of employment discrimination that courts are to treat with the same degree of concern as all other forms of discrimination.¹⁵¹

they are women and the view that women aspire to "women's work" because society has socialized them to be women. The allegedly more historical liberal approach converges with the ahistorical, conservative approach insofar as both approaches attribute the historical change in women's work aspirations to "societal" forces that are so vague and ill-identified as to constitute essentialist explanations for women's experience and work consciousness. This slippage is analogous to that observed in some cultural feminist work. See Schultz, *Room to Maneuver (f)or a Room of One's Own? Practice Theory and Feminist Practice*, 14 LAW & SOC. INQUIRY 123, 128 (1989); Scott, *Gender: A Useful Category of Historical Analysis*, 91 AM. HIST. REV. 1053, 1065 (1986).

¹⁴⁸ For examples of recent work documenting the history of labor market discrimination against women, see P. FONER, cited above in note 20; M. GREENWALD, *WOMEN, WAR, AND WORK: THE IMPACT OF WORLD WAR I ON WOMEN WORKERS IN THE UNITED STATES* (1980); J. JONES, cited above in note 17; S. KENNEDY, cited above in note 19; A. KESSLER-HARRIS, cited above in note 19; and R. MILKMAN, *GENDER AT WORK: THE DYNAMICS OF JOB SEGREGATION BY SEX DURING WORLD WAR II* (1987).

¹⁴⁹ I borrow this phrase from Richard Delgado, who borrowed it from Milner Ball. See Delgado, *On Taking Back Our Civil Rights Promises: When Equality Doesn't Compute*, 1989 WIS. L. REV. 579, 580 & n.6 (citing Ball, *Stories of Origins and Constitutional Possibilities*, 87 MICH. L. REV. 2280 (1989)). Here the "story of origins" refers to the constitutive myths and ideals we ascribe both to title VII's ban on sex discrimination, and to ourselves as a nation and as a people in having enacted the legislation.

¹⁵⁰ See, e.g., C. BIRD, *BORN FEMALE* (1968); A. SMITH, *EMPLOYMENT DISCRIMINATION LAW* 327 (1978); *Developments in the Law — Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1167 (1971). At least one scholar has challenged this view. See Gold, *A Tale of Two Amendments: The Reasons Congress Added Sex to Title VII and Their Implication for the Issue of Comparable Worth*, 19 DUQ. L. REV. 453, 457-69 (1981) (arguing that even if members of Congress who introduced the amendment adding sex did so for the purpose of trying to defeat the bill, the majority of Congress did not have that motivation when they approved the amendment).

¹⁵¹ For sources showing that Congress considered sex segregation to be a primary evil that title VII was intended to address, see note 110 above. For sources showing that Congress intended the courts to treat sex discrimination with the same seriousness as discrimination on other grounds, see SENATE REPORT, cited above in note 110, at 7 ("While some have looked at . . . women's rights as a frivolous divertissement, this Committee believes that discrimination against women is no less serious than other prohibited forms of discrimination, and that it is to be accorded the same degree of concern given to any type of similarly unlawful conduct."); and

The courts' failure to confront the history of sex discrimination in the labor market has drained judicial decisions of passion and moral vision. Like any civil rights statute, title VII's prohibition of sex discrimination has meaning only if it is understood to symbolize a nation's shared commitment to ending a history of oppression for a disadvantaged group. In the absence of any recognition that women's work aspirations have been shaped collectively and historically by their experience of coercion in the workworld, courts have viewed women's work preferences as formed freely and individually within private pre-work realms.

(b) *Evidence of Special Efforts.* — The courts' anti-historical view has led them to accept uncritically employers' assertions that their efforts to attract women to nontraditional work failed due to women's lack of interest. In the early race discrimination cases, the same historical perspective that led courts to impose an affirmative duty to correct for past discrimination led them to evaluate employers' claimed efforts to attract minorities critically, with an eye toward results. But in sex discrimination cases, the courts' failure to place women's "interest" in the context of past discrimination has prevented them from invoking the futility doctrine or the accompanying duty to attract women to historically segregated jobs.¹⁵² In this climate, employers have been able to bolster the lack of interest argument by claiming that they made special efforts to recruit women for male-dominated jobs. Table 4 illustrates this pattern.

HOUSE REPORT, cited above in note 110, at 5, which contains similar statements. See also *Barnes v. Costle*, 561 F.2d 983, 987 (D.C. Cir. 1977) (concluding that "Congress was deeply concerned about employment discrimination based on gender, and intended to combat it as vigorously as any other type of forbidden discrimination").

¹⁵² By refusing to infer from statistical evidence that employers even engaged in past discrimination, many courts have eliminated the factual foundation for invoking the futility doctrine and the accompanying affirmative duty in sex discrimination cases. In some cases, judges have accompanied their refusal to find past discrimination with explicit announcements that title VII does not require employers to make any efforts to recruit women. See, e.g., *Gilbert v. East Bay Mun. Dist.*, 19 Fair Empl. Prac. Cas. (BNA) 304, 307 (N.D. Cal. 1979) ("Defendant was under no obligation to affirmatively solicit female applicants for these supervisory positions."); *EEOC v. Korn Indus.*, 17 Fair Empl. Prac. Cas. (BNA) 954, 959 (D.S.C. 1978) ("There is no obligation on the defendant to waste its time and money trying to find women of extraordinary size, strength, and stamina."), *aff'd on other grounds and remanded*, 662 F.2d 256 (4th Cir. 1981). Some courts have gone even farther and held that even if the employer discriminated against women in the recent past, title VII still does not require the employer to correct for that discrimination by taking affirmative steps to attract women to formerly segregated jobs. See, e.g., *Ste. Marie v. Eastern R.R. Ass'n*, 650 F.2d 395, 403-04 (2d Cir. 1981); *Lewis v. Tobacco Workers' Int'l Union*, 577 F.2d 1135, 1146-47 (4th Cir. 1978), *cert. denied*, 439 U.S. 1989 (1979).

TABLE 4:
THE RELATION BETWEEN EVIDENCE OF SPECIAL EFFORTS AND THE
SUCCESS OF THE LACK OF INTEREST ARGUMENT

| | Special efforts | No special efforts |
|--------|-----------------|--------------------|
| P wins | 9 (42.9%) | 22 (66.7%) |
| D wins | 12 (57.1%) | 11 (33.3%) |
| Total | 21 (100.0%) | 33 (100.0%) |

Courts have been far more likely to credit the lack of interest explanation in cases in which employers asserted that they made special efforts to attract women to nontraditional jobs than in cases in which they did not.¹⁵³ To assess the significance of this pattern one should understand the nature of the "special efforts" employers claimed to have made. In the vast majority of cases, employers' efforts fell far short of what is encompassed in a traditional affirmative action plan.¹⁵⁴

Not even a written affirmative action plan guaranteed that an employer was serious about trying to integrate women into nontraditional work, as *Parker v. Siemens-Allis, Inc.*,¹⁵⁵ illustrates. The case involved a female employee's allegations that a small motor manufacturer in Little Rock was discriminating against women by relegating them to lower-paid jobs in the electrical department, while reserving the higher-paid machine shop jobs for men.¹⁵⁶ The statistical evidence showed that as late as 1980, the machine shop remained ninety-five percent male, while the electrical department was eight-five percent female.¹⁵⁷ The company tried to defend these disparities by asserting that women were not interested in working in the machine shop. Unfortunately for the company, however, its equal employment opportunity officer had been sufficiently naïve to acknowledge this ex-

¹⁵³ $p = .08$. A logistic regression analysis showed that, even after controlling simultaneously for evidence of past discrimination and anecdotal evidence, evidence of special efforts increased employers' likelihood of prevailing. (The T-ratio for the evidence of special efforts variable was -1.524, with a corresponding p-value of .13.)

¹⁵⁴ Of the 21 claims of special efforts, in only seven (33.3%) had the employers promulgated written affirmative action plans that appeared to include goals and timetables for women. See, e.g., *EEOC v. Sears, Roebuck & Co.*, 628 F. Supp. 1264, 1292-94 (N.D. Ill. 1986), *aff'd*, 839 F.2d 302 (7th Cir. 1988); *EEOC v. Cook Paint & Varnish Co.*, 24 Fair Empl. Prac. Cas. (BNA) 51, 52 (W.D. Mo. 1980); *United States v. County of Fairfax*, 19 Fair Empl. Prac. Cas. (BNA) 753, 758, 760 (E.D. Va. 1979), *vacated on other grounds*, 629 F.2d 932 (4th Cir. 1980), *cert. denied*, 449 U.S. 1979 (1981).

¹⁵⁵ 601 F. Supp. 1377 (E.D. Ark. 1985).

¹⁵⁶ See *id.* at 1378-79.

¹⁵⁷ See *id.* at 1379.

planation in the company's affirmative action plan, which stated the following justification for why it was not discriminatory to assign women to electrical winding work: "There are some things about the job that appeal to the females such as: clean working conditions, routine work, which once learned, gives the female the opportunity to plan the family budget, menu and other responsibilities directly related to family ties."¹⁵⁸ The court found this plan to be a per se violation of title VII and held the company liable.¹⁵⁹

Parker is an extreme example,¹⁶⁰ but it is only one end of a spectrum. These employers claimed that women's failure to respond to their recruiting efforts proved that women lacked interest in non-traditional work. Yet, of the twenty-one employers who claimed to have tried to "woo" women into nontraditional jobs, not one presented documentation that women had declined actual job offers at a higher rate than men. Indeed, only a few employers offered any data at all to support their assertions that women were less responsive than men to attempts to persuade them to take nontraditional jobs.¹⁶¹ In most cases, the employers offered only the undocumented assertions of managers that when they had approached women about the possibility of doing nontraditional work, the women said they found the work unappealing.¹⁶² Moreover, even when employers made this assertion, they had not targeted their recruiting efforts specifically toward women's groups. None of the employers contacted working women's organizations, advertised in women's publications, or otherwise communicated through female-oriented networks that the firm was looking to hire women for nontraditional work.¹⁶³ Thus, employers have

¹⁵⁸ *Id.* at 1385 (quoting the company's affirmative action plan).

¹⁵⁹ *See id.*

¹⁶⁰ For another case in which a court was able to conclude easily that the employer's affirmative action plan was woefully lacking in substance, see *Capaci v. Katz & Besthoff, Inc.*, 711 F.2d 647 (5th Cir. 1983), *cert. denied*, 466 U.S. 927 (1984). *Capaci* held that the company's alleged affirmative action program did little to dispel the inference of sex discrimination, where the company's president testified that "[t]he sex aspect of the discrimination was passed as a part of the Civil Rights Act as an afterthought" and offered few specifics other than a written statement of good faith intentions to treat women on a nondiscriminatory basis. *Id.* at 657-58.

¹⁶¹ In a few cases, employers presented data showing that women had applied or bid for the jobs at issue at disproportionately lower rates than men. *See, e.g., Durant v. Owens-Illinois Glass Co.*, 517 F. Supp. 710, 716 (E.D. La. 1980), *aff'd*, 656 F.2d 89 (5th Cir. 1981); *Davis v. City of Dallas*, 483 F. Supp. 54, 61 (N.D. Tex. 1979). Applicant data merely beg the question, however, for they do not prove whether women underapplied because of lack of interest or because the employer's discrimination discouraged them.

¹⁶² *See, e.g., Ste. Marie v. Eastern R.R. Ass'n*, 650 F.2d 395, 403 (2d Cir. 1981); *EEOC v. Mead Foods, Inc.*, 466 F. Supp. 1, 3-4 (W.D. Okla. 1977).

¹⁶³ There are a variety of networks that employers might use to target their recruiting efforts specifically toward women. All over the country, there are community-based programs designed to help women enter nontraditional employment. *See Law, "Girls Can't Be Plumbers" — Affirmative Action for Women in Construction: Beyond Goals and Quotas*, 24 HARV. C.R.-C.L. L. REV. 45, 53-55 & n.33 (1989) (describing such organizations). Employers might also contact

presented little or no evidence that the failure of their alleged special efforts is tied to women's lack of interest, and the efforts most employers claim to have made lack substance.

The courts' reliance on these efforts to resolve the interest question reflects and reproduces a narrow understanding of discrimination that is based on an anti-historical view of women's work aspirations. In this view, women's work preferences have been shaped not by a labor market that has defined only traditional female employment as possible, but rather by social forces operating in pre-work realms. Because women's work "choices" are fixed before they begin working, employer "coercion" or discrimination consists only of actions to bar women from exercising their already formed preferences. Thus, when employers have made even minimal efforts to recruit women on a sex-neutral basis, they have eliminated the formal barriers, and courts are likely to attribute segregation to women's preexisting preferences.

*Davis v. City of Dallas*¹⁶⁴ illustrates this perspective. Until 1972, the Dallas Police Department (DPD) had excluded women from regular police officer jobs,¹⁶⁵ and thereafter, women in the local labor force had underapplied.¹⁶⁶ The case turned on whether women's low application rate was attributable to DPD's discrimination or instead to women's lack of interest in police work.¹⁶⁷ To support the lack of interest explanation, DPD presented the testimony of its recruiting officer, who "had found a marked resistance to police patrol work among females."¹⁶⁸ DPD did not verify this statement with data showing that women had declined offers for police work more often than men. Nor did DPD demonstrate that it had targeted its recruitment efforts specifically toward women's organizations. Nonetheless, the court accepted the lack of interest argument, concluding that it was the "most plausible" explanation for women's underrepresentation among applicants.¹⁶⁹

other working women's organizations, broader women's rights groups, traditionally female educational institutions, or a variety of other organizations that serve women, including welfare rights groups. *See id.* at 53 (reporting that of the 1500 women who contacted Non-Traditional Employment for Women in New York in an effort to find nontraditional work, most received public assistance). Employers might also advertise in newsletters distributed by such organizations, or in magazines, newspapers, or radio shows designed to appeal specifically to a female audience. All these sorts of targeted outreach efforts find precedent in the race discrimination context. *See, e.g.,* *Movement for Opportunity v. Detroit Diesel*, 18 Fair Empl. Prac. Cas. (BNA) 557, 571-72 (S.D. Ind. 1978), *aff'd sub nom. Movement for Opportunity & Equality v. General Motors Corp.*, 622 F.2d 1235 (7th Cir. 1980); *United States v. Central Motor Lines*, 338 F. Supp. 532, 565 (W.D.N.C. 1971).

¹⁶⁴ 483 F. Supp. 54 (N.D. Tex. 1979).

¹⁶⁵ *See id.* at 59.

¹⁶⁶ *See id.* at 61.

¹⁶⁷ *See id.* at 59.

¹⁶⁸ *Id.* at 61.

¹⁶⁹ *See id.*

The court revealed the thinking that animates the judicial framework for interpreting sex segregation: "These job preferences of females may be born of attitudes conditioned by *societal* sexist values. But frustration with the realization that equality of opportunity untouched by gender remains a *social* goal and not an achieved reality must not be visited on this employer in the form of liability."¹⁷⁰ Women's work preferences have thus been "conditioned" not by a labor market that has taught them their place, but by prior "social" forces. Because women's work preferences are formed in these social (even if sexist) spheres, one cannot really expect employers to have much success in recruiting women for nontraditional work: even minimal, unspecified efforts to recruit women on a sex-neutral basis confirm that women find nontraditional work unappealing. The employer's role is limited to ensuring that women who have already formed an interest in nontraditional work are not precluded from obtaining information about job openings. The law's role is limited to ensuring that employers do not withhold this information from those women. Absent is any notion that employers or courts might enable other women to aspire to work they have never before been able to dream of doing. Creating a workworld "untouched by gender" remains only a "social" goal, beyond the responsibility of managers or judges.

(c) *Anecdotal Evidence of Discrimination.* — The same narrow approach that has led judges to credit evidence of special efforts has also led them to insist that plaintiffs present individual victims¹⁷¹ of discrimination to refute the lack of interest argument. In most cases (thirty-two out of fifty-four, or 59.3%), plaintiffs have presented anecdotal evidence that the employer discriminated against individual women. In the remaining cases, however, they have sought to invoke the principle from early race discrimination doctrine that protected class members need not prove their "interest" in jobs in which they have been traditionally underrepresented. If the courts had acknowledged that employers have historically relegated women to low-paid, traditionally female jobs, they might have concluded that it is unreasonable to demand proof that individual women are interested in nontraditional work. Most people do not aspire to something they have never been permitted to do.

¹⁷⁰ *Id.* (emphasis added).

¹⁷¹ Anecdotal evidence shows that the employer discriminated against live "victims." For this reason, it is sometimes referred to as evidence of "individual instances of discrimination," or "victim testimony." A woman who failed to apply for a job because the employer's sex discrimination persuaded her that it would be futile to do so is referred to in legal doctrine as a futility victim. This term should not mislead us into seeing such women as passive. By failing to submit herself to an employment process she perceives as discriminatory, the victim is actively seeking to avoid the experience of victimization. See Bumiller, *Victims in the Shadow of the Law: A Critique of the Model of Legal Protection*, 12 *SIGNS* 421 (1987).

The courts have not taken such an approach, however, as Table 5 illustrates.

| TABLE 5: THE RELATION BETWEEN ANECDOTAL EVIDENCE AND THE SUCCESS OF THE LACK OF INTEREST ARGUMENT | | |
|---|--------------------|-----------------------|
| | Anecdotal evidence | No anecdotal evidence |
| P wins | 22 (68.8%) | 9 (40.9%) |
| D wins | 10 (31.3%) | 13 (59.1%) |
| Total | 32 (100.0%) | 22 (100.0%) |

Courts have relied heavily on the presence of individual victims to decide whether to accept the lack of interest argument.¹⁷² Indeed, anecdotal evidence has served for plaintiffs a function parallel to the one that evidence of special efforts has served for employers. Whereas employers have been able to bolster the lack of interest argument by asserting that women failed to respond to their efforts to recruit them for nontraditional jobs, plaintiffs have been able to counter the argument by presenting individual women who were interested in nontraditional jobs but were discriminatorily rejected or discouraged from applying. Controlling for both types of evidence simultaneously shows

| TABLE 6: THE RELATION BETWEEN ANECDOTAL EVIDENCE/SPECIAL EFFORTS AND THE SUCCESS OF THE LACK OF INTEREST ARGUMENT | | | | |
|---|--|--|---|---|
| | No anecdotal evidence/ special efforts | Anecdotal evidence/ special efforts | No anecdotal evidence/ no special efforts | Anecdotal evidence/ no special efforts |
| P wins | 3 (30.0%) | 6 (54.5%) | 6 (50.0%) | 16 (76.2%) |
| D wins | 7 (70.0%) | 5 (45.5%) | 6 (50.0%) | 5 (23.8%) |
| Total | 10 (100.0%) | 11 (100.0%) | 12 (100.0%) | 21 (100.0%) |

¹⁷² Courts were approximately three times more likely to reject the lack of interest argument in cases in which plaintiffs presented anecdotal evidence than in cases in which they presented no such evidence ($p = .04$).

that the parties' likelihood of prevailing on the lack of interest argument shifts dramatically according to whether one type of evidence, but not the other, is present.¹⁷³

Courts have been most likely to attribute sex segregation to women's lack of interest when the employer claimed to have made special efforts to attract women and the plaintiffs presented no anecdotal evidence. At the other end of the spectrum, courts have been least likely to accept the lack of interest argument in cases when the plaintiffs presented anecdotal evidence and the employer did not claim special efforts to recruit women. In the middle of this spectrum, courts accepted the lack of interest argument in 50.0% of the cases involving neither evidence of special efforts nor anecdotal evidence and in 54.5% of the cases involving both types of evidence. The similar outcomes suggest that these two types of evidence tend to cancel each other out, leaving courts in the same interpretive void as when neither type of evidence is present.

That courts have relied heavily on anecdotal evidence of discrimination reveals, perhaps even more clearly than their reliance on evidence of recruiting efforts, the anti-historical, individualistic perspective they have brought to their interpretations of sex segregation in the workplace. The courts' failure to acknowledge employers' historical influence on women's work aspirations has left judges in a quandary about how to characterize women's current preferences. Anecdotal evidence has served to convince judges that the "modern" woman exists — that women have managed to emerge from early life experiences with aspirations for nontraditional work. This image allows judges to attribute current patterns of sex segregation to employers' "coercion" rather than to women's own "choice." Thus, the courts' reliance on anecdotal evidence both reflects and reproduces the notion that employers merely prevent or permit women to exercise preexisting job preferences, rather than create those preferences in the first place.

Both conservative courts and liberal courts have relied on anecdotal evidence to interpret sex segregation.¹⁷⁴ Conservative courts

¹⁷³ The p-value for Table 6 is .09. Furthermore, a logistic regression analysis showed that anecdotal evidence greatly increased plaintiffs' likelihood of prevailing, even after controlling simultaneously for evidence of past discrimination and evidence of special efforts. (The T-ratio for the anecdotal evidence variable was 1.958, with a corresponding p-value of .05.)

¹⁷⁴ A few liberal courts have been willing to reject the lack of interest argument even in the absence of anecdotal evidence, but most of these were "easy" cases in which the evidence showed that the employer was operating an overt system of sex segregation during the period when the employer claimed women lacked interest in the work. *See, e.g., Harless v. Duck*, 619 F.2d

have stated explicitly that they disregard statistical proof of segregation without supplemental evidence that the employer discriminated against individual women. In *EEOC v. Sears, Roebuck & Co.*,¹⁷⁵ for instance, the statistical studies showed that women were severely underrepresented in higher-paying commission sales jobs compared to their representation among all sales applicants. Nonetheless, the court berated the EEOC for failing to produce individual victims of discrimination. "It is almost inconceivable," said the judge, "that, in a nationwide suit alleging a pattern and practice of intentional discrimination for at least 8 years involving more than 900 stores, EEOC would be unable to produce even one witness who could credibly testify that Sears discriminated against her."¹⁷⁶ According to the judge, the EEOC's failure to produce individual victims served only to confirm that Sears' segregation was attributable to women's own choice.¹⁷⁷ The *Sears* court was by no means exceptional. In fully half of the claims for which courts accepted the lack of interest justification, judges pointed to the fact that plaintiffs had produced no individual victims.¹⁷⁸

This same attitude appears in the decisions of the liberal courts. Even many judges who have rejected the lack of interest argument have seemed skeptical that women are, as a group, as interested as men in nontraditional work. But the fact that a few women announced their interest persuaded the judges to reject the interest explanation. In *Kohne v. Imco Container Co.*,¹⁷⁹ for example, a plastic bottle manufacturer with a proven history of sexually exclusionary practices tried to defend claims of discrimination in promotion and transfer by asserting that its women employees were not interested

611, 614, 618 (6th Cir.), *cert. denied*, 449 U.S. 872 (1980); *Mitchell v. Mid-Continent Spring Co.*, 583 F.2d 275, 280 (6th Cir.) (finding sex discrimination in a plant whose superintendent testified at trial that he assigned women only to lower paying positions because "that's the type of work that's open for them to do"), *modified*, 587 F.2d 841 (6th Cir. 1978), *cert. denied*, 441 U.S. 922 (1979); *Chrapliwy v. Uniroyal, Inc.*, 458 F. Supp. 252, 262, 264 (N.D. Ind. 1977). At the other end of the spectrum, a few conservative courts have accepted the lack of interest explanation even though plaintiffs presented anecdotal evidence of discrimination or discouragement. *See, e.g., Peltier v. City of Fargo*, 396 F. Supp. 710, 722 (D.N.D. 1975) (rejecting three women's testimony that they failed to apply for police officer jobs because they believed the city would not hire women, as mere "feelings . . . subjectively dependent on rumors that could not be substantiated"), *rev'd on other grounds*, 533 F.2d 374 (8th Cir. 1976).

¹⁷⁵ 628 F. Supp. 1264 (N.D. Ill. 1986), *aff'd*, 839 F.2d 302 (7th Cir. 1988).

¹⁷⁶ *Id.* at 1324-25.

¹⁷⁷ *See id.*

¹⁷⁸ *See, e.g., Piva v. Xerox Corp.*, 654 F.2d 591, 595 (9th Cir. 1981); *EEOC v. H.S. Camp & Sons, Inc.*, 542 F. Supp. 411, 446-47 (M.D. Fla. 1982); *Gilbert v. East Bay Mun. Dist.*, 19 Fair Empl. Prac. Cas. (BNA) 304, 307 (N.D. Cal. 1979); *EEOC v. Korn Indus.*, 17 Fair Empl. Prac. Cas. (BNA) 954, 959 (D.S.C. 1978), *aff'd on other grounds and remanded*, 662 F.2d 256 (4th Cir. 1981).

¹⁷⁹ 480 F. Supp. 1015 (W.D. Va. 1979).

in moving into higher-paying nontraditional jobs. Although finding that "many of the female [employees] prefer the jobs to which they are assigned," the court cited the testimony of other women employees to conclude that at least some women "are or have been interested in the spectrum of traditionally male jobs at the plant."¹⁸⁰ In other cases, liberal courts relied on anecdotal evidence to reject the lack of interest argument, even though the judges seemed ambivalent about whether women were on the whole as interested as men in nontraditional work.¹⁸¹

This points to an interesting paradox — and problem — with the courts' reliance on anecdotal evidence. The lack of interest argument depends on the proposition that women are systematically less interested than men in nontraditional work. Its purpose is to refute statistical evidence showing that the employer has underhired women relative to their representation among some eligible pool of workers. This statistical evidence is not undermined simply because *some* women in the proposed pool lack interest in the work; *some* men undoubtedly lack interest in it also. The lack of interest assertion undermines the statistical evidence if, and only if, the women in the proposed pool are sufficiently less interested than men in the work to account for the statistical disparity.¹⁸²

Judges have no way of discovering, on the basis of the evidence offered in these cases, whether the relative proportions of women and

¹⁸⁰ *Id.* at 1027–28.

¹⁸¹ See, e.g., *Mitchell v. Mid-Continent Spring Co.*, 583 F.2d 275, 278–79 (6th Cir.), *modified*, 587 F.2d 841 (6th Cir. 1978), *cert. denied*, 441 U.S. 922 (1979); *Kilgo v. Bowman Transp. Inc.*, 570 F. Supp. 1509, 1515 (N.D. Ga. 1983), *aff'd*, 789 F.2d 859 (11th Cir. 1986); *Ostapowicz v. Johnson Bronze Co.*, 369 F. Supp. 522, 537, 538 (W.D. Pa. 1973) (acknowledging that the employer had produced "a large amount of testimony that certain women were happy in the plant and thought there was no discrimination" but relying on the fact that a number of women had not opted out of the class to reject the lack of interest argument), *aff'd in part and vacated in part on other grounds*, 541 F.2d 394 (3d Cir. 1976), *cert. denied*, 429 U.S. 1041 (1977).

¹⁸² To illustrate, suppose the plaintiffs' evidence shows that, of 100 people hired by the employer, only five (5%) were women. By comparison, of the 1000 workers that plaintiffs contend were eligible for hire in the local area, 400 (40%) were women and 600 (60%) were men. Now suppose the employer proves that of the 400 women workers plaintiffs contend were eligible for hire, 200 (50%) lacked interest in the employer's work. The employer might contend that women's lack of interest explains their underrepresentation. But if 50% (300) of the men in the original pool of 1000 lacked interest in the work, too, the number of eligible male workers would decline from 600 to 300. This would leave a final pool of 500 eligible and interested workers, 200 (40%) of whom are women and 300 (60%) of whom are men. Thus, the proportions of men and women in this final pool are identical to those in the pool originally proposed by plaintiffs. Obviously the lack of interest argument cannot explain the fact that the employer's hires included only five (5%) women, where the pool of eligible and interested workers included 200 (40%) women. To show that the employer hired women in proportion to their representation among eligible and interested workers, the employer must show that of whatever number of eligible workers in the original pool of 1000 were interested in the work, only 5% were women and 95% were men. This would mean that of the original pool, women were 19 times less interested than men in the work.

men in the plaintiffs' proposed pool accurately reflect the relative proportions of women and men who are interested in the work. They turn to anecdotal evidence as a way out of this dilemma. But anecdotal evidence merely reproduces this same uncertainty. With enough resources, a good plaintiff's lawyer can always find some women who were interested in the work. On the other hand, a good management lawyer can probably also find at least a few women willing to say that they were not interested in the work. Because there is no way of verifying whether the plaintiffs' or the employer's witnesses are representative of the larger pool of eligible women, anecdotal evidence gets the court no closer to determining what proportion of the women in the pool were interested in the work. Even if this problem could be surmounted, there would still be no way of determining what proportion of men in the pool were interested in the work. Thus, anecdotal evidence does not and cannot reveal whether the eligible women were sufficiently less interested than the men to explain the degree of female underrepresentation.¹⁸³

It therefore seems paradoxical that so many courts have characterized statistical evidence as "meaningless" and berated plaintiffs for failing to introduce anecdotal evidence that is surely just as meaningless for ascertaining the validity of the lack of interest explanation. By the same token, it seems paradoxical that so many courts have chosen to rely heavily on anecdotal evidence when it does little or nothing to establish the relative interests of women and men in the work. The truth is that, with or without anecdotal evidence, the judge is forced to make assumptions about whether the plaintiffs' statistical data reflects the relative proportions of men and women interested in nontraditional work. Because people's work interests are not quantifiable, the judge is inevitably left with an evidentiary void. In the end, the judge cannot avoid the problem of interpretation.

In the early race discrimination cases, courts approached this same problem of interpretation with a sensitivity to the fact that minorities' work aspirations had been formed in the context of historical labor market discrimination. Courts filled in the evidentiary "gap" by assuming that minorities were no less interested than whites in higher-paying, more challenging work. Thus, the courts' attribution of minorities' work aspirations to forces within the world of work — rather than private pre-labor market influences — grounded the presumption

¹⁸³ This is the point the EEOC's lawyers were trying to make in *Sears*, when they argued that "where 47,000 hires and promotions were at issue . . . it would have been impossible to present enough individual demonstrations of discrimination to meaningfully reflect on the statistics." *EEOC v. Sears, Roebuck & Co.*, 839 F.2d 302, 311 (7th Cir. 1988). The Seventh Circuit rejected this argument, remarking that "[e]ven a few examples would have helped bring 'cold numbers convincingly to life.'" *Id.* at 311-12 (citation omitted). The court failed to explain exactly what these examples would have proved.

that there were no systematic racial differences in work preferences. If judges had been unwilling to take such an approach, employers would have simply rationalized the status quo as the expression of minorities' own work choices.

To a large extent, this rationalization of the status quo has occurred in sex discrimination cases. Courts have been unwilling to take an approach that situates women's work aspirations in the context of historical labor market discrimination. Instead, they have attributed women's work aspirations exclusively to their early socialization. Anecdotal evidence has become central, not because it allows judges to estimate with any accuracy whether women's work interests differ systematically from men's, but because it signifies that society has progressed sufficiently to produce women who grow up aspiring to "men's work." The individual victim has come to symbolize the "modern" woman, that genderless creature entitled to the law's protection.

But the judicial focus on the victim has left the majority of working women in the wake of the law. Within the interpretive framework embraced by both conservative and liberal courts, employers' practices are defined as discriminatory only insofar as they prevent individual women from realizing preexisting preferences for nontraditional work — and not because those practices are part of a larger workplace environment in which many women have never been able to dream of the possibility of doing such work.

IV. STORIES ABOUT WOMEN AND WORK: A RHETORICAL STUDY OF THE TWO COMPETING JUDICIAL INTERPRETATIONS OF SEX SEGREGATION

In this Part, I examine how judges have used the "choice" and "coercion" explanations to legitimate accepting or rejecting the lack of interest argument. Even though both explanations rest in a common evidentiary framework, each of them also stands as a separate narrative that justifies a different legal outcome. I refer to the rhetorical justification used by courts who have accepted the lack of interest argument as the conservative story of choice, and to the one used by courts who have rejected that argument as the liberal story of coercion.¹⁸⁴ Each of these justifications may be envisioned as a "story" with a beginning, middle, and end. There is dramatic tension and resolution, as each story draws on a particular set of images of women and work to explain why women are underrepresented in nontradi-

¹⁸⁴ Each of these stories is, of course, an "ideal type" drawn from a reading of the cases in the aggregate. The ideal type does not necessarily apply in every case.

tional work. Each story ends with a "moral" that legitimates a certain way of understanding sex segregation in the workplace.¹⁸⁵

The critical assumption that binds the two stories within a single interpretive universe is the assumption that women form stable job preferences, independently of employer action, in early social realms. In the conservative story, this assumption is accompanied by a naturalized, totalizing account of gender. Sex segregation exists because women are "feminine," and the feminine role is so all-encompassing that it implies by definition a preference for "feminine" work. In the liberal story of coercion, by contrast, the assumption that women's job preferences are fixed before they begin working means that gender difference must be suppressed. Liberal courts can justify holding employers liable only to the extent that judges can represent women as "ungendered" subjects who emerge from a gender-free social order with the same aspirations and values as men.

That these two stories constitute the entire interpretive universe creates problems for plaintiffs challenging sex segregation. By accepting the premise that only women who escape early sex-role socialization can aspire to nontraditional jobs, the liberal story reinforces the conservative one. By failing to develop an account of how employers create jobs and job aspirations along gendered lines, both stories ultimately assume away the major problem title VII should be addressing: the organization of work structures and workplace cultures to disempower large numbers of women from aspiring to and succeeding in more highly rewarded nontraditional work.

A. The Conservative Story of Choice

The conservative story of choice is the familiar one told by the *Sears* court: women are "feminine," nontraditional work is "masculine," and therefore women do not want to do it. The story rests on an appeal to masculinity and femininity as oppositional categories. Women are "feminine" because that is the definition of what makes them women. Work itself is endowed with the imagined human characteristics of masculinity or femininity based on the sex of the workers who do it. "Femininity" refers to a complex of womanly traits and aspirations that by definition precludes any interest in the work of men. Even though the story always follows this same logic, the story changes along class lines in the way it is told.¹⁸⁶ Cases

¹⁸⁵ I have borrowed heavily from Martha Fineman's insightful description of the role of narrative in legal decisionmaking about child custody. See Fineman, *supra* note 23, at 753-58.

¹⁸⁶ Courts have been almost equally likely to attribute segregation to women's "choice" in blue-collar and white-collar cases. They rejected the lack of interest argument in 59.0% (23 out of 39) of the claims involving blue-collar jobs, and in 53.3% (eight out of 15) of the claims involving white collar jobs.

involving blue-collar work emphasize the "masculinity" of the work, drawing on images of physical strength and dirtiness. Cases involving white-collar work focus on the "femininity" of women, appealing to traits and values associated with domesticity.

In the blue-collar context, the story begins by describing the work in heavily gendered terms. Courts invoke oppositional images of work as heavy versus light, dirty versus clean, and explicitly align the left side of the equation with masculinity (while implicitly aligning the right side with femininity). Thus, nontraditional jobs in bakeries are described as "hot, heavy, and hard work."¹⁸⁷ Males, of course, do this "heavy work," while females do the "lighter," "less demanding" work.¹⁸⁸ Work in a cardboard box factory is "dirty and somewhat heavy"; the factory is located in a "very poor section of the city," where women fear to tread.¹⁸⁹ Road maintenance work is "outside laboring work" that is "physically demanding and generally unappealing" to women.¹⁹⁰ Working as a food inspector for a railroad association is characterized as "nocturnal prowling in railroad yards inspecting rotten food" that is not "attractive" to "young women."¹⁹¹

In such cases, conservative courts did not bother to question whether the work fit the gendered characteristics ascribed to it. Indeed, employers did not assert that being male was a bona fide occupational qualification for these jobs.¹⁹² Although some of the jobs may have required considerable physical strength, the courts made no inquiry into whether this was true and if so, whether only men had sufficient strength to perform them. Similarly, although some of the settings may have been dirty, a tolerance for dirt is surely not a "job qualification" possessed only by men. Within the story of coercion, nontraditional work is simply reified, endowed with characteristics typically thought of as masculine, as though there were a natural connection between heavy, dirty work and manhood itself. Ironically, courts associated such work with masculinity even in some cases where the employer's traditionally female jobs involved equally dirty and physically demanding work.¹⁹³

¹⁸⁷ EEOC v. Mead Foods, Inc., 466 F. Supp. 1, 3 (W.D. Okla. 1977).

¹⁸⁸ See *id.* at 4.

¹⁸⁹ EEOC v. Service Container Corp., 19 Fair Empl. Prac. Cas. (BNA) 1614, 1616 (W.D. Okla. 1976). The judge in this case seemed to believe that women who work in relatively unskilled jobs in factories do not live in "very poor" sections of the city, evidence of a class bias that colors a number of these opinions.

¹⁹⁰ Mazus v. Department of Transp., 489 F. Supp. 376, 388 (M.D. Pa. 1979), *aff'd*, 629 F.2d 870 (3d Cir. 1980), *cert. denied*, 449 U.S. 1126 (1981).

¹⁹¹ Ste. Marie v. Eastern R.R. Ass'n, 650 F.2d 395, 403 (2d Cir. 1981).

¹⁹² For a description of the bona fide occupational qualification defense, see note 113 above.

¹⁹³ In EEOC v. H.S. Camp & Sons, Inc., 542 F. Supp. 411 (M.D. Fla. 1982), for example, a meat processing plant explicitly barred women from a number of departments, on the ground that the jobs there were too physically demanding for women. The court accepted this reasoning,

Once the court described the work in reified, masculine terms, women's lack of interest followed merely as a matter of "common sense." "The defendant manufactures upholstered metal chairs,"¹⁹⁴ said one court. "Common sense tells us that few women have the skill or the desire to be a welder or a metal fabricator, and that most men cannot operate a sewing machine and have no desire to learn."¹⁹⁵ Or, as another court put it: "Common practical knowledge tells us that certain work in a bakery operation is not attractive to females The work is simply not compatible with their personal interests and capabilities."¹⁹⁶ In these blue-collar cases, courts almost never state their specific assumptions about women workers' traits or attitudes. Just what is it about women's "personal interests" that causes them not to want to be welders or bakers? Interestingly, employers and courts almost never invoke women's family roles as the reason for their lack of interest in male-dominated blue-collar jobs.¹⁹⁷ They appeal instead to a much broader, naturalized conception of femininity that draws on physical images of weakness and cleanliness and applies even to women without family responsibilities.

While in blue-collar cases, the story begins by describing the work as "masculine," in white-collar cases, it begins instead by describing women as "feminine." In the white-collar context, courts invoke social and psychological characteristics rather than physical images. In particular, employers invoke women's domestic roles to explain their lack of interest in traditionally male white-collar work,¹⁹⁸ and conservative

even though the company produced no evidence other than the owner's subjective opinion that women were incapable of doing these jobs. *See id.* at 429. Ironically, the company did hire women for other lower-paying departments in which the jobs appeared to require equal physical strength. Women predominated in the meat packing department, for example, where they were required to carry boxes of meat weighing from 80 to 90 pounds. In the all-male receiving department, by contrast, the men did not rely on brute strength but used hydraulic jacks to unload heavy boxes from delivery trucks. In addition, the company had hired no women for at least three other departments that, according to the court's own description, required no particular physical prowess. *See id.* at 422.

¹⁹⁴ *Logan v. General Fireproofing Co.*, 6 Fair Empl. Prac. Cas. (BNA) 140, 144 (W.D.N.C. 1972).

¹⁹⁵ *Id.*

¹⁹⁶ *EEOC v. Mead Foods, Inc.*, 466 F. Supp. 1, 3 (W.D. Okla. 1977).

¹⁹⁷ I found only one blue-collar case in which an employer appealed to women's family roles to explain their alleged preferences for traditionally female work. *See Parker v. Siemens-Allis*, 601 F. Supp. 1377, 1385 (E.D. Ark. 1985) (noting the company's assertion in its affirmative action plan that women prefer electrical wiring to higher-paid machine-shop work because the former is "clean . . . [and] routine work, which once learned, gives the female the opportunity to plan the family budget, menu and other responsibilities directly related to family ties").

¹⁹⁸ *See, e.g., Kraszewski v. State Farm Ins. Co.*, 38 Fair Empl. Prac. Cas. (BNA) 197, 222 (N.D. Cal. 1985); *EEOC v. Akron Nat'l Bank & Trust Co.*, 497 F. Supp. 733, 748 (N.D. Ohio 1980). It is not clear why employers use different explanations for sex segregation in the blue-collar and white-collar contexts. Perhaps employers have realized that it would be implausible to try to attribute sex segregation to women's domestic roles in blue-collar settings, in which

courts accept these explanations. In *Gillespie v. Board of Education*,¹⁹⁹ the court explained why women teachers did not want to be promoted to administrative positions as follows:

[M]ales who are pursuing careers in education are often the principal family breadwinners. Women . . . , on the other hand, have frequently taken teaching jobs to supplement family income and leave when this is no longer necessary or they are faced with the exigencies of raising a family. We regard this as a logical explanation and find as a matter of fact that there has been no discrimination in the North Little Rock School District.²⁰⁰

In some cases the appeal to women's domestic roles is less direct, but even broader in its implications. In *Sears*,²⁰¹ for example, the court invoked women's experience in the family as the underlying cause of a whole host of "feminine" traits and values that lead them to prefer lower-paying noncommission sales jobs. According to the court:

Women tend to be more interested than men in the social and cooperative aspects of the workplace. Women tend to see themselves as less competitive. They often view noncommission sales as more attractive than commission sales, because they can enter and leave the job more easily, and because there is more social contact and friendship, and less stress in noncommission selling.²⁰²

women with family responsibilities have long labored in jobs that demand as much of their time as the higher-paying jobs done by men. See generally L. WEINER, FROM WORKING GIRL TO WORKING MOTHER 86-87 (1985) (describing the relegation of married women to lower-paid blue-collar work before 1940). In numerous cases in this study, women were assigned to lower-paying female jobs in factories, even though those jobs were apparently on the same shifts as the higher-paying, male-dominated jobs. See, e.g., *Parker*, 601 F. Supp. at 1385; *Chrapliwy v. Uniroyal, Inc.*, 458 F. Supp. 252, 266 (N.D. Ind. 1977); *Ostapowicz v. Johnson Bronze Co.*, 369 F. Supp. 522, 527 (W.D. Pa. 1973), *aff'd in part and vacated in part on other grounds*, 541 F.2d 394 (3d Cir. 1976), *cert. denied*, 429 U.S. 1041 (1977); see also *Mitchell v. Mid-Continent Spring Co.*, 583 F.2d 275, 279 (4th Cir. 1978), *cert. denied*, 441 U.S. 922 (1979) (noting that a plant permitted male-only machine set-up employees to transfer between the day and night shifts, but refused to permit female-only machine operators to do so, because "there was a shortage of men. However, females were easier to hire."). Conversely, employers may have realized that they could not plausibly defend women's absence from white-collar work with images of physical difference, because white-collar work is light, clean work of the type associated with femininity in the blue-collar context. Thus, in white-collar cases, employers have had to resort to imputed social and psychological characteristics to ground their conceptions of femininity and masculinity.

¹⁹⁹ 528 F. Supp. 433 (E.D. Ark. 1981), *aff'd on other grounds*, 692 F.2d 529 (8th Cir. 1982).

²⁰⁰ *Id.* at 437.

²⁰¹ *EEOC v. Sears, Roebuck & Co.*, 628 F. Supp. 1264 (N.D. Ill. 1986), *aff'd*, 839 F.2d 302 (7th Cir. 1988).

²⁰² *Id.* at 1308.

To support these generalizations, the court cited the testimony of the historian Sears hired as an expert witness,²⁰³ who attributed the "nurturing" aspects of women's personalities directly to their historic domestic roles.²⁰⁴ This reasoning transforms the observation that women have been family caretakers into the far more general proposition that they do not aspire to nontraditional work.

Even though the white-collar story begins by portraying women as "feminine," the story nonetheless depends on a contrasting image of nontraditional white-collar work as "masculine." In the *Sears* case, women were romanticized as friendly and noncompetitive, but this mattered only because such traits were the opposite of the ones allegedly needed for successful commission selling. Sears' retail testing manual described a commission salesperson as a "special breed of cat" who has a "sharper intellect" and "more powerful personality" than noncommission salesworkers,²⁰⁵ someone who is "active" and "has a lot of drive," has "considerable physical vigor," and "likes work which requires physical energy."²⁰⁶ Sears also administered to sales applicants a test that included such questions as, "Do you have a low-pitched voice?," "Do you swear often?," "Have you ever done any hunting?," and "Have you played on a football team?"²⁰⁷ Yet, it did not occur to the court to ask whether Sears had used the sales manual and test to construct the job in masculine terms.²⁰⁸ Like the

²⁰³ See *id.* at 1308 & n.42.

²⁰⁴ Rosalind Rosenberg was the historian who testified for Sears. The gist of her testimony is captured in the following excerpt:

Women's role in American society and in the American family unit has fostered the development of 'feminine' values that have been internalized by women themselves . . . Throughout American history women have been trained from earliest childhood to develop the humane and nurturing values expected of the American mother. Women's participation in the labor force is affected by the values they have internalized. For example: Women tend to be more relationship-centered and men tend to be more work-centered. Women tend to be more interested than men in the cooperative, social aspects of the work situation. These differences in female and male self-perception present difficulties for women in traditionally masculine occupations.

Offer of Proof Concerning the Testimony of Dr. Rosalind Rosenberg, *EEOC v. Sears, Roebuck & Co.*, 628 F. Supp. 1264 (N.D. Ill. 1986) (No. 79-C-4373) [hereinafter Testimony of Rosalind Rosenberg].

²⁰⁵ *Sears*, 628 F. Supp. at 1290.

²⁰⁶ *Id.* at 1300.

²⁰⁷ *Id.* at 1300 n.29.

²⁰⁸ The fact that Sears' characterization of the commission sales job varied dramatically from the way the job was defined in an earlier era shows that there is nothing necessary or inevitable about the way Sears characterized it. Susan Porter Benson has shown that from 1890 to 1940, when department store managers were eager to attract women to retail sales jobs (including commission sales) in the newly expanding service sector, managers defined the essence of "good selling" in terms of stereotypically feminine traits rather than the masculine traits emphasized by Sears. See S. BENSON, *COUNTER CULTURES: SALESWOMEN, MANAGERS, AND CUSTOMERS IN AMERICAN DEPARTMENT STORES, 1890-1940*, at 130-31 (1986).

courts in blue-collar cases, the judge simply took for granted that the gendered characteristics Sears ascribed to the commission sales position were an inherent, necessary part of the job. Once the court endowed the job with these stereotypically masculine characteristics, it became a foregone conclusion that women would find it unappealing.

In the end, the logic of the story of choice converges in both blue-collar and white-collar cases. It makes no difference that in blue-collar cases gender is described in physical imagery, while in white-collar cases gender is described in social and psychological terms. In both contexts, the story portrays gender as so complete and natural as to render invisible the processes through which gender is socially constructed by employers. The story is powerful because it appeals to the widely held perception that the sexes are different. It extends this perception into an account of gendered job aspirations: if women have different physical characteristics or have had different life experiences from men, then they must have different work interests, too. There is no room for the possibility that women are different from men in certain respects, yet still aspire to the same types of work. If gender is all-encompassing, it is also so natural as to be unalterable. Women's preferences for "feminine" work are so central to the definition of womanhood itself that they remain unchanged (and unchangeable), regardless of what women experience at work. Because there is no room for change, employers do not and cannot contribute to shaping women's job preferences.

The flip side of the coin is that work itself is somehow inherently "masculine" or "feminine," apart from anything employers do to make it that way. With the world neatly compartmentalized into gendered people and jobs, sex segregation becomes easy to explain. Women bring to the workplace their preexisting preferences for traditionally female work, and employers merely honor those preferences. In the story of choice, workplace segregation implies no oppression or even disadvantage for women. Courts telling this story often describe women's jobs as "more desirable" than men's jobs, even where women's jobs pay lower wages, afford less prestige, and offer fewer opportunities for advancement than men's.²⁰⁹ The implicit point of reference for evaluating the desirability of the work, is, of course, the courts' own construction of women's point of view: no court would describe women's work as more desirable to men. The moral of the conservative story is that working women choose their own economic disempowerment.

²⁰⁹ See, e.g., *EEOC v. H.S. Camp & Sons, Inc.*, 542 F. Supp. 411, 446 (M.D. Fla. 1982); *EEOC v. Mead Foods, Inc.*, 466 F. Supp. 1, 4 (W.D. Okla. 1977).

B. *The Liberal Story of Coercion*

Like their conservative counterparts, liberal courts assume that women form their job preferences before they begin working. This shared assumption, however, drives liberal courts to a rhetoric that is the opposite of conservative rhetoric. Whereas the conservative story has a strong account of gender that implies a preference for "feminine" work, the liberal story has no coherent account of gender. To the contrary, liberal courts suppress gender difference, because the assumption of stable, preexisting preferences means that they can hold employers responsible for sex segregation only by portraying women as ungendered subjects who emerge from early life realms with the same experiences and values, and therefore the same work aspirations, as men.

The liberal story centers around the prohibition against stereotyping. Courts reject the lack of interest argument by reasoning that "Title VII was intended to override stereotypical views" of women.²¹⁰ "[T]o justify failure to advance women because they did not want to be advanced is the type of stereotyped characterization which will not stand."²¹¹ This anti-stereotyping reasoning is the classic rhetoric of gender neutrality: it invokes the familiar principle that likes are to be treated alike.²¹² The problem lies in determining the extent to which women are "like" men. On its face, the anti-stereotyping reasoning seems to deny the existence of group-based gender differences and assert that, contrary to the employer's contention, the women in the proposed labor pool are no less interested than the men in nontraditional work. Below the surface, however, this reasoning reflects a basic ambiguity (and ambivalence) about the extent of gender differences. For the anti-stereotyping rule may be interpreted to admit that women are *as a group* less interested than men in nontraditional work, and to assert only that some *individual* women may nonetheless be exceptions who do not share the preferences of most women. Under such an individualized approach, the employer is forbidden merely from presuming that *all* women are so "different" from men that they do not aspire to nontraditional work.²¹³

²¹⁰ EEOC v. Cook Paint & Varnish Co., 24 Fair Empl. Prac. Cas. (BNA) 51, 56 (W.D. Mo. 1980).

²¹¹ Ostapowicz v. Johnson Bronze Co., 369 F. Supp. 522, 537 (W.D. Pa. 1973), *aff'd in part and vacated in part on other grounds*, 541 F.2d 394 (3d Cir. 1976), *cert. denied*, 429 U.S. 1041 (1977).

²¹² See C. MacKinnon, *SEXUAL HARASSMENT OF WORKING WOMEN* 122-23 (1978).

²¹³ The Supreme Court has adopted this form of anti-stereotyping reasoning in both the title VII and fourteenth amendment contexts. See, e.g., City of Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 707-08 (1978) (holding that under title VII "[e]ven a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply"); Frontiero v. Richardson, 411 U.S. 677 (1973) (adopting a similar rationale in the fourteenth amendment context).

This individualized approach finds support in a number of cases, which emphasize the exceptional woman who does not "share the characteristics generally attributed to [her] group."²¹⁴ Some courts condemn employers who raise the lack of interest argument for "stereotyping" all women as being uninterested in nontraditional work.²¹⁵ Other courts reject the interest argument by observing that although some women do not desire nontraditional jobs, others do.²¹⁶ These courts reason that "Title VII rights are peculiar to the individual, and are not lost or forfeited because some members of the protected classes are unable or unwilling to undertake certain jobs."²¹⁷ Logically, however, this reasoning does not suffice to refute the lack of interest argument. The employer is not asserting that no individual woman is interested in nontraditional work, but rather that, within the pool of eligible workers, the women are as a group sufficiently less interested than men to explain their underrepresentation.²¹⁸

The focus on individual women thus serves a largely symbolic function. The liberal story invokes the image of the victim, the modern woman who comes to the labor market with a preexisting interest in nontraditional work, to signify the presence of a new social order in which the sexes are equal and ungendered. In this brave new world free of gender, women emerge from pre-work realms with the same life experiences and values, and therefore the same work aspirations, as men. The liberal story suppresses gender difference *outside* the workplace to attribute sex segregation *within* the workplace to employer coercion. Insofar as women approach the labor market with the same experiences and values as men, they must have the same job preferences as men, and to the extent that women end up severely underrepresented in nontraditional jobs, the employer must have discriminated.

The symbolic use of the victim, however, does not resolve the underlying issue of how representative of other women the victim is. This poses no practical difficulty when the only women who testify are the plaintiff's witnesses, who say that the employer prevented them from realizing their preferences for nontraditional jobs. But

²¹⁴ *Ostapowicz*, 369 F. Supp. at 537.

²¹⁵ See, e.g., *Mitchell v. Mid-Continent Spring Co.*, 583 F.2d 275, 281-83 (6th Cir.), *modified*, 587 F.2d 841 (6th Cir. 1978), *cert. denied*, 441 U.S. 922 (1979); *EEOC v. Cook Paint & Varnish Co.*, 24 Fair Empl. Prac. Cas. (BNA) 28, 51, 56 (W.D. Mo. 1980); *EEOC v. Rath Packing Co.*, 40 Fair Empl. Prac. Cas. (BNA) 559, 566 (S.D. Iowa 1979), *aff'd in part and rev'd in part on other grounds*, 787 F.2d 318 (8th Cir. 1986); *Chrapliwy v. Uniroyal, Inc.*, 458 F. Supp. 252, 262-63 (N.D. Ind. 1977).

²¹⁶ See, e.g., *Kohne v. Imco Container Co.*, 480 F. Supp. 1015, 1027-28 (W.D. Va. 1979); *Ostapowicz*, 369 F. Supp. at 537-38.

²¹⁷ *Rath*, 40 Fair Empl. Prac. Cas. (BNA) at 566; *accord Mitchell*, 583 F.2d at 281; *Chrapliwy*, 458 F. Supp. at 278.

²¹⁸ See *supra* pp. 1797-98.

when employers present testimony from other women, who say that they are happier doing traditionally female jobs and that they would not take more highly rewarded nontraditional jobs even if offered, the liberal story confronts a dilemma. Often, liberal courts have simply characterized these women as unrepresentative of the larger group of women in the labor pool.²¹⁹ But they have no way of explaining why these women should be considered less representative of most women than the victims, or how they came to have more gendered job aspirations than other women. Because liberal courts have no coherent explanation for gender difference, more conservative courts can easily portray the victims, rather than those satisfied with traditionally female work, as the anomalous, unrepresentative group.²²⁰

Indeed, at a conceptual level, the liberal suppression of gender difference actually reinforces the conservative story. Because the liberal story assumes that women form their job preferences through pre-workworld socialization, it accepts the notion that only women who are socialized the same as men desire such work. To secure legal victory under the liberal approach, women must present themselves as ungendered subjects without a distinctive history, experience, culture, or identity. But this approach only validates the conservative notion that women who are "different" ("feminine") in non-work aspects automatically have "different" ("feminine") work preferences, as well.

The EEOC's position in *Sears* illustrates this dynamic. The EEOC emphasized that contrary to the district court's findings, it had *not* assumed that female sales applicants were as interested as males in commission sales jobs. Instead, the EEOC had recognized that the women were less interested than the men, and it had controlled for sex differences in interest by isolating the subgroup of female applicants

²¹⁹ See, e.g., *Palmer v. Shultz*, 815 F.2d 84, 110 (D.C. Cir. 1987); *Kohne*, 480 F. Supp. at 1027-28 & n.6; *Rath*, 40 Fair Empl. Prac. Cas. (BNA) at 565-66; *Ostapowicz*, 369 F. Supp. at 537-38. Employers tend to present testimony from women who were hired for traditionally female jobs, rather than from women who were rejected from employment altogether, as examples of women who prefer traditionally female work. But as Judge Thornberry has observed, the fact that women already working in traditionally female jobs have grown accustomed to them says little about whether women who were denied employment altogether "might well have taken [nontraditional jobs], if not precluded from doing so by a discriminatory hiring policy." *Durant v. Owens-Illinois Glass Co.*, 656 F.2d 89, 91 (5th Cir. 1981) (Thornberry, J., dissenting).

²²⁰ As one court who accepted the lack of interest argument stated: "To be sure there are some females who would be interested in this type of physical [road maintenance] work but a reliable percentage has not yet been developed." *Mazus v. Department of Transp.*, 489 F. Supp. 376, 388 (M.D. Pa. 1979), *aff'd*, 629 F.2d 870 (3d Cir. 1980), *cert. denied*, 449 U.S. 1126 (1981); see also *EEOC v. Sears, Roebuck & Co.*, 628 F. Supp. 1264, 1314 (N.D. Ill. 1986) (dismissing the EEOC's historical examples of women who have responded to nontraditional job opportunities as isolated instances involving only "small groups of unusual women" rather than "the majority of women"), *aff'd*, 839 F.2d 302 (7th Cir. 1988).

who were similar to the males on a number of different background characteristics and who therefore could be presumed to be equally interested in commission sales.²²¹ The EEOC argued that "men and women who are alike with respect to [these] . . . characteristics . . . would be similar with respect to their interest in commission sales."²²² Judge Cudahy, in a dissent from the Seventh Circuit's opinion, agreed.²²³ Although he condemned the majority and the district court for "stereotyping" women,²²⁴ his acceptance of the EEOC's argument suggests that the only women whose job interests were being inaccurately stereotyped were those whose earlier life experiences resembled men's.²²⁵ Judge Cudahy's and the EEOC's position assumed that the women had formed specific preferences for commission or noncommission saleswork before they applied at Sears. Indeed, Judge Cudahy expressed this assumption explicitly, emphasizing that the EEOC's case would have been much stronger if it had produced "even a handful of witnesses to testify that Sears had frustrated their *childhood dreams* of becoming commission sellers."²²⁶ Once this assumption was accepted, it was impossible to analyze seriously the extent to which *Sears* had shaped its workers' preferences. The only alternative was to identify the illusive group of women whose personal histories were so similar to men's that one might safely presume that they had been socialized to prefer the same jobs.

This liberal approach faces two strategic difficulties that leave working women vulnerable to the conservative explanation for segregation. The first may be termed a credibility problem. Insofar as the liberal story relies on an image of women as "ungendered," it is less believable than the conservative story. Like most people, judges tend to find implausible the suggestion that women have the same characteristics, experiences, and values as men. Employers are able to turn this perception to their advantage by arguing that even feminists have acknowledged that our sexist society socializes girls and women into "feminine" roles.²²⁷ In *Sears*, for example, the historian

²²¹ See EEOC Brief, *supra* note 6, at 127, 141. Among the characteristics the EEOC controlled for in its statistical analyses were age, education, job applied for, job type experience, product line experience, and expanded commission sales experience. See *supra* note 7.

²²² EEOC Brief, *supra* note 6, at 38.

²²³ See EEOC v. Sears, Roebuck & Co., 839 F.2d 302, 360-66 (7th Cir. 1988) (Cudahy, J., concurring in part and dissenting in part).

²²⁴ See *id.* at 361-62.

²²⁵ See *id.* at 362.

²²⁶ *Id.* (emphasis added).

²²⁷ There is now an extensive feminist literature taking the position that women's and men's divergent life experiences lead them to develop different perspectives, attitudes, and values. Carol Gilligan's book is perhaps the most prominent example of work in this tradition. See C. GILLIGAN, IN A DIFFERENT VOICE (1982). The popularity of Gilligan's work attests to the fact that people find the cultural "difference" thesis intuitively plausible. For critiques of

retained by Sears was able to cite the feminist consciousness-raising movement to the company's advantage, asserting that the very need for consciousness-raising was premised on the "recognition that men and women have internalized different personality traits and different attitudes."²²⁸ In the end, it made no difference that the EEOC had controlled for sex differences in background, for the judge believed that even women whose life experiences resembled men's remained sufficiently "different" that they lacked interest in commission sales jobs.²²⁹ The conservative story thus capitalizes on the widely held perception of sexual difference to imply that, because girls are conditioned to conform to "feminine" sex roles, adult women will automatically aspire to "feminine" work.

This same dynamic emerges more subtly in connection with the "different family roles" explanation for women's underrepresentation in nontraditional jobs. The liberal approach refuses to credit this explanation, but fails to make clear whether this refusal is based on a denial that women have heavier family responsibilities than men or rather a rejection of the notion that women's concededly heavier family responsibilities lead them to choose female-dominated jobs.²³⁰ This ambiguity weakens the liberal story, for women do assume a greater burden than men for sustaining family life.²³¹ Again, the result is greater credibility for the conservative story, which clearly acknowledges that domestic labor is gendered. The flaw in the conservative story is not that it unfairly "stereotypes" women as family caretakers, but rather that it portrays women's domestic roles as the fulfillment of a broader set of unalterable "feminine" attributes that dictates a preference for low-paying, traditionally female jobs.

Gilligan's work, see Auerbach, Blum, Smith & Williams, *On Gilligan's In A Different Voice*, 11 FEMINIST STUD. 149 (1985); Scott, cited above in note 147, at 1065; and *Women and Morality*, 50 SOC. RES. 487 (1983).

²²⁸ Testimony of Rosalind Rosenberg, *supra* note 204, at 766; see also *Davis v. City of Dallas*, 483 F. Supp. 54, 61 (N.D. Tex. 1979) (attributing women's failure to apply for police work to "job preferences . . . born of attitudes conditioned by societal sexist values").

²²⁹ See *EEOC v. Sears, Roebuck, & Co.*, 628 F. Supp. 1264, 1302-08 (N.D. Ill. 1986), *aff'd*, 839 F.2d 302 (7th Cir. 1988).

²³⁰ See, e.g., *Palmer v. Shultz*, 815 F.2d 84, 110 (D.C. Cir. 1987); *EEOC v. Akron Nat'l Bank & Trust Co.*, 497 F. Supp. 733, 748 (N.D. Ohio 1980). But see *Kraszewski v. State Farm Gen. Ins. Co.*, 38 Fair Empl. Prac. Cas. (BNA) 197, 221 (N.D. Cal. 1985) (acknowledging that women were interested in careers as insurance sales agents "despite difficult family situations").

²³¹ Studies have universally found that women do far more child care and other domestic work than men and that married men increase their share of housework very little in response to increases in their wives' paid employment. See, e.g., B. BERGMANN, *supra* note 1, at 261-69; S. BERK, *THE GENDER FACTORY: THE APPORTIONMENT OF WORK IN AMERICAN HOUSEHOLDS* (1985); M. GEERKEN & W. GOVE, *AT HOME AND AT WORK: THE FAMILY'S ALLOCATION OF LABOR* (1983). See generally P. ENGLAND & G. FARKAS, *supra* note 1, at 94-99 (1986) (summarizing these studies and the prevailing explanation for men's low participation in housework).

This leads to the second, related problem with the liberal story. Because it denies gender difference, the liberal approach misses the ways in which employers draw upon societal gender relations to produce sex segregation at work. The liberal prohibition against stereotyping assumes that the problem is that the employer has inaccurately identified the job interests of (at least some exceptional) women who have already formed preferences for nontraditional work. By stopping at this level of analysis, however, liberal courts fail to inquire into or discover the deeper processes through which employers actively shape women's work aspirations along gendered lines. The liberal approach to discriminatory recruiting exemplifies this overly narrow focus. Through their recruiting strategies, employers do more than simply publicize job vacancies to those who are already interested: they actually stimulate interest among those they hope to attract to the jobs. The harm of sexually discriminatory recruiting is thus not only, or even primarily, that it fails to provide information about nontraditional job openings to women who have already formed an interest in those jobs. The deeper harm of discriminatory recruiting is that it is part of a larger process of investing nontraditional jobs with such a masculinized image and culture that many women will never picture themselves as the sort of person the employer has in mind and will therefore never actualize their potential interest in such jobs.²³² Evidence shows that sex-segregated advertising depicting the "Man for the Job" in stereotypically masculine terms has precisely this effect.²³³

²³² This process works in the opposite direction, too, when employers create low-paying jobs and then recruit in a way that is designed to attract women. After title VII took effect a number of employers in the cases in this study transferred some of the responsibilities of an exclusively male job to a new, much lower-paid job, and then proceeded to construct the new job as a "female" job by recruiting and hiring all or mostly women. See, e.g., *Peltier v. City of Fargo*, 396 F. Supp. 710, 713 (D.N.D. 1975) (involving a female car marker position carved out of a police officer job), *aff'd in part and rev'd in part on other grounds*, 533 F.2d 374 (8th Cir. 1976); *Wetzel v. Liberty Mut. Ins. Co.*, 372 F. Supp. 1146, 1150-51 (W.D. Pa. 1974) (involving a female claims representative position carved out of a claims adjuster job), *aff'd*, 511 F.2d 199 (3d Cir. 1975), *vacated and remanded on other grounds*, 424 U.S. 737 (1976). There is evidence that managers construct new jobs as "female" by designing their recruiting strategies and even their location decisions specifically with women in mind, so that they may take advantage of the fact that women are a cheap source of labor. See Kelley, *Commentary: The Need To Study the Transformation of Job Structures*, in *SEX SEGREGATION IN THE WORKPLACE*, *supra* note 1, at 261, 264. Some multinational corporations justify hiring women for the least skilled jobs in ideological terms, citing women's "natural patience" and "manual dexterity"; they justify paying women low wages by claiming the women do not need to work and will quit when they get married anyway. See A. FUENTES & B. EHRENREICH, *WOMEN IN THE GLOBAL FACTORY* 11-15 (1983).

²³³ A classic study by Bem and Bem illustrates this point. Whereas only 5% of the women surveyed expressed interest in nontraditional telephone "lineman" and "frameman" jobs when the ad described those jobs in sex-biased language, 25% expressed interest when the language was sex-neutral, and fully 45% expressed interest when the ad was written to appeal to women. Bem & Bem, *Does Sex-Biased Job Advertising 'Aid and Abet' Sex Discrimination?*, 3 J. APPLIED

Nonetheless, even though courts have uniformly held that title VII prohibits the use of sex-segregated advertising,²³⁴ only two courts have come close to identifying its deeper harm.²³⁵ Most have simply noted that it violates title VII's mandate of gender-neutral treatment and have not really analyzed the nature of the injury.²³⁶

Just as sex-segregated advertising constructs an artificial masculine culture around nontraditional work, so, too, does word-of-mouth recruiting. Drawing on doctrine developed in the race discrimination context, a few liberal courts have invoked the discriminatory impact of word-of-mouth recruiting as a rationale for rejecting the lack of interest argument. These courts might have acknowledged that the

SOC. PSYCHOLOGY 6 (1973). Even apparently sex-neutral language can communicate to women that they are not who the employer had in mind for the job. Cockburn describes the following ad for an electronics engineer: "Enthusiasm, along with creativity, drive and a clear understanding of your personal contribution are needed in a business where technological limits are constantly being tested and new frontiers broken and explored." C. COCKBURN, *supra* note 14, at 181. As Cockburn states:

On the face of it, this is not discriminatory wording. But women know how women are usually defined — not with words like 'drive,' 'limits,' 'test.' [A] woman is likely to read [this] as addressed not to women but to men. To many women it will be more of a warning than an invitation.

Id.

²³⁴ It was not until 1969, however, that the EEOC guidelines on sex discrimination prohibited employers from placing neutrally worded advertisements under "Male" or "Female" newspaper headings. Compare 29 C.F.R. § 1604.4(b) (1966) (permitting advertising placements under "Male" and "Female" headings to convey "that some occupations are considered more attractive to persons of one sex than the other") with 29 C.F.R. § 1604.5 (1989) (prohibiting such placements unless sex is a bona fide occupational qualification for the job).

²³⁵ See *Wetzel*, 372 F. Supp. at 1150–51, 1154 (recognizing that the company's use of separate, heavily gendered recruiting brochures was designed to communicate to women that the only position appropriate for them was the lower-paying claims representative job, but not the higher-paying claims adjuster job); see also *Kraszewski v. State Farm Ins. Co.*, 38 Fair Empl. Prac. Cas. (BNA) 197, 230–31 (N.D. Cal. 1985) (using a similar analysis).

²³⁶ See, e.g., *Chrapliwy v. Uniroyal, Inc.*, 458 F. Supp. 252, 266–67, 284 (N.D. Ind. 1977); *Hill v. Western Elec. Co.*, 12 Fair Empl. Prac. Cas. (BNA) 1175, 1179 (E.D. Va. 1976), *aff'd in part and rev'd in part on other grounds*, 596 F.2d 99 (4th Cir.), *cert. denied*, 444 U.S. 929 (1979); *Peltier v. City of Fargo*, 396 F. Supp. 710, 727 (D.N.D. 1975), *aff'd in part and rev'd in part on other grounds*, 533 F.2d 374 (8th Cir. 1976). *Peltier* illustrates the pitfalls for plaintiffs caused by the courts' failure to develop an analysis of the deeper gender dynamics of sexually discriminatory advertising. The plaintiffs were three women who had been hired in 1973 for the police department's newly created, all-female car marker position. They claimed that they had been discriminatorily denied the opportunity to become regular police patrol officers. They had never applied to be patrol officers, but they testified that they believed it would have been futile to do so in light of the fact that the department had never hired any women for the job. *Id.* at 713–14. The police department had advertised the job as one for males only until the spring of 1973, when it stopped advertising altogether and began to rely on word-of-mouth recruiting. Even in the face of this evidence, however, the court held that the fact that the plaintiffs' failure to apply for the patrol officer job defeated their claims. The court recognized that the sex-segregated advertising was discriminatory, but it concluded that the advertising could not have discouraged the plaintiffs from applying, because the last male-only ad had been placed shortly before the plaintiffs were hired as car markers. See *id.* at 723.

harm of word-of-mouth recruiting is not merely that it fails to disseminate job information to women who are already interested in the work, but that it also actively (if informally) shapes the potential interest of women in applying. Word-of-mouth recruiting signals to women that they would be unwelcome in an occupational culture so masculinized that the employer relies on male employees to recruit new workers through mostly male networks. However, the few courts that have condemned word-of-mouth recruiting have not extended their reasoning this far. They have portrayed word-of-mouth recruiting not as an active means of creating a gendered occupational culture, but rather as a passive failure to provide women formally equal access to information about job opportunities. They have reasoned that when the employer fails to publicize vacancies for nontraditional jobs, women who are already interested in those jobs will be less likely than men to be told about openings by existing male employees.²³⁷

Though these liberal courts deserve credit for recognizing that lack of awareness of opportunity poses a barrier for women seeking nontraditional jobs,²³⁸ their failure to identify the deeper gender dynamics has restricted application of the word-of-mouth recruiting doctrine and left it on shaky ground. Ironically, other courts have used the liberal rhetoric of gender neutrality against itself to transform the word-of-mouth recruiting doctrine into a defense of sex segregation. In *Wilkins v. University of Houston*,²³⁹ the plaintiffs alleged that "new faculty members often were selected through operation of an 'old boy network' by which exclusively male or male-dominated recruitment committees"

²³⁷ As one court stated, "[n]o notices of vacancies were ever posted, nor had the Union ever recommended any of its women members for these positions [as meat-cutters]. Consequently plaintiffs were never informed of the vacancies for which they could apply." *Babrocky v. Jewel Food Co.*, 773 F.2d 857, 867 (7th Cir. 1985). Of the 54 sex discrimination claims in my study, in 17 claims the employer used word-of-mouth recruiting. Of these 17 claims, in only eight did the court rely even in part on the employer's use of word-of-mouth recruiting to reject the lack of interest argument. See, e.g., *Wheeler v. City of Columbus*, 686 F.2d 1144, 1148, 1152 (5th Cir. 1982); *Davis v. Richmond, F. & P. R.R.*, 593 F. Supp. 271, 278 & n.1, 279 (E.D. Va. 1984), *aff'd in part and rev'd in part on other grounds*, 803 F.2d 1322 (4th Cir. 1986). *Kraszewski* is the only one of these cases in which the court portrayed the use of word-of-mouth recruiting as an active form of constructing a male-oriented occupational culture rather than a merely passive form of failing to provide information about job opportunities to already interested women. *Kraszewski*, 38 Fair Empl. Prac. Cas. (BNA) at 228-29 (citing from the company's own employment manual to show how word-of-mouth recruiting inevitably produces candidates who look just like the men who are recruiting them).

²³⁸ An extensive literature documents that male workers are more likely to share job information with other men than with women. For this reason, men are more likely to secure their jobs through personal contacts, while women are more likely to use formal job-search methods. For a summary of this literature, see Roos & Reskin, *Institutional Factors Contributing to Sex Segregation in the Workplace*, in *SEX SEGREGATION IN THE WORKPLACE*, cited above in note 1, at 235, 241-42, 245-46.

²³⁹ 654 F.2d 388 (5th Cir. 1981), *vacated on other grounds*, 459 U.S. 809 (1982).

overlooked women.²⁴⁰ The evidence showed that as many as fifteen percent of all faculty openings had been filled with "preselected" candidates the same day the vacancy was announced, and almost half of all faculty positions had been filled by men without any women being considered.²⁴¹ The plaintiffs invoked a long line of Fifth Circuit race discrimination doctrine condemning these practices as discriminatory. But the court dismissed this doctrine as irrelevant, reasoning that "the obstacle of widespread segregation faced by potential black employees . . . is not present for women seeking university faculty positions . . . [because] . . . women . . . have been educated at the same institutions and by the same professors as their male counterparts."²⁴² In the world portrayed by the Fifth Circuit, old-boy networks are not part of college life; female students are just as likely as male students to be favored by their (mostly male) professors.²⁴³ By failing to recognize that gender dynamics permeate social life, the court blinded itself to the processes through which employers extend and strengthen those same dynamics into the workplace itself. In an effort to ground title VII in a vision of a gender-neutral world, the liberal story thus renders invisible the mechanisms of reproducing sex segregation at work.²⁴⁴

C. *The Need for a New Story*

The story one tells about women and work has profound implications for the power of law to dismantle sex segregation in the workplace. Both the conservative and liberal stories are stories about women and work; they are not explicitly about law. But intertwined with their portrayals of women and work are implicit messages — or "morals" — about the constitutive and transformative power of title

²⁴⁰ See *id.* at 399.

²⁴¹ See *id.* at 396 n.8, 399.

²⁴² *Id.* at 400.

²⁴³ This, of course, is not true. The *New York Times* reported the findings of a recent study which is only "the latest in a steady stream of research over the last two decades showing that while they may be sitting side by side, male and female [college students] have substantially different educational experiences." Fiske, *Lessons*, N.Y. Times, Apr. 11, 1990, at B8, col. 1. According to Catherine G. Krupnick, the Harvard Graduate School of Education researcher who conducted the study: "College catalogues should carry warnings: The value you receive will depend on your sex." *Id.* Like earlier researchers, Krupnick's study found that "faculty members consistently take male students and their contributions more seriously than females and their ideas." *Id.*

²⁴⁴ Other courts also have refused to characterize word-of-mouth recruiting as sexually discriminatory. In *EEOC v. Service Container Corp.*, 19 Fair Empl. Prac. Cas. (BNA) 1614 (W.D. Okla. 1976), for example, the plaintiff contended that the plant's reliance on its almost-exclusively male workforce to recruit new shop workers discriminated against women. The court disposed of this contention in a sentence, noting that the plaintiff herself "came to work as a referral." See *id.* at 1616. But the plaintiff had applied because she had learned specifically that the plant was replacing another female worker, not because she had heard that the plant was hiring workers generally. See *id.*

VII. The conservative story implies that law does not and cannot influence women's work aspirations. There is a natural order of gender and work that even "an Act of Congress cannot overcome."²⁴⁵

The liberal story is an inadequate alternative. Indeed, the liberal story's suppression of gender leaves plaintiffs vulnerable to the conservative explanation for sex segregation at work. The partial truth of the conservative story is that people and jobs are gendered. But they are not naturally or inevitably so. To provide an adequate explanation for sex segregation, one must account for how employers arrange work systems so as to construct work and work aspirations along gendered lines. The liberal story fails to develop such an account because it shares the conservative assumption that women form their work preferences exclusively in early pre-work realms. This assumption, in turn, leads the liberal approach to adopt an overly restrictive view of the role title VII can play in dismantling sex segregation in the workplace. If women have already formed their job preferences before seeking work, the most the law can do is to ensure that employers do not erect formal barriers to prevent women from realizing their preexisting preferences.

There is a need for a new story to make sense of sex segregation in the workplace. Gender conditioning in pre-work realms is too slender a reed to sustain the weight of sex segregation. To explain sex segregation, the law needs an account of how employers actively construct gendered job aspirations — and jobs — in the workplace itself.

V. AN ALTERNATIVE ACCOUNT OF GENDER AND WORK

This Part draws on a rich body of recent sociological research to construct an alternative account of sex segregation in the workplace. Unlike the liberal story, this account recognizes the reality of gender in social life. It acknowledges that women and men are subjected to different expectations and experiences growing up, and that, as a result, they tend to express preferences for different types of work early in their lives. But unlike the conservative story, the new account does not find sex-role conditioning so monolithic or so powerful that it dictates irrevocably gendered job aspirations. Girls may be taught to be "feminine," but this does not imply that adult women will aspire only to traditionally female work throughout their adult lives. Rather, women's work preferences are formed, created, and recreated in response to changing work conditions.

This new account traces gendered work attitudes and behaviors to organizational structures and cultures in the workplace. Like all

²⁴⁵ EEOC v. Mead Foods, Inc., 466 F. Supp. 1, 3 (W.D. Okla. 1977).

workers, women adapt their work aspirations and orientations rationally and purposefully, but always within and in response to the constraints of organizational arrangements not of their own making. Providing women the formal opportunity to enter nontraditional jobs is a necessary but insufficient condition to empower them to claim those jobs, because deeper aspects of work systems pose powerful disincentives for women to enter and remain in nontraditional employment. The new account of work and gender thus reverses the causation implicit in the current judicial framework. Sex segregation persists not because most women bring to the workworld fixed preferences for traditionally female jobs, but rather because employers structure opportunities and incentives and maintain work cultures and relations so as to disempower most women from aspiring to and succeeding in traditionally male jobs.

The new account suggests a more transformative role for the law in dismantling sex segregation at work. Once we realize that women's work aspirations are shaped not solely by amorphous "social" forces operating in early pre-work realms, but primarily by the structures of incentives and social relations within work organizations, it becomes clear that title VII can play a major role in producing the needed changes. Title VII cases challenging segregation seek to alter (at least indirectly) the very structural conditions that prevent women from developing and realizing aspirations for higher-paid, more challenging nontraditional jobs. By attributing women's aspirations to forces external and prior to the workworld, courts deny their own ability to (re)construct workplace arrangements and the work aspirations that arise out of those arrangements. In a very real sense, the legal system has perpetuated the status quo of sex segregation by refusing to acknowledge its own power to dismantle it.

*A. The Inadequacy of the Pre-Labor Market Explanation
for Sex Segregation in the Workplace*

The current judicial framework proceeds from the view that women bring to the labor market stable, fixed preferences for certain types of work. Whether women's preferences for traditionally female work are traced to biological influences or early socialization to "feminine" sex roles, this view attributes workplace segregation to social forces operating prior to the labor market rather than to forces operating within the workplace itself. I will refer to this view as the pre-labor market explanation for workplace segregation by sex.

The pre-labor market explanation depends on two different sets of assumptions. The first is the assumption that young women emerge from early life experiences articulating preferences for different types of work than young men. This assumption is correct. There is, however, nothing "natural" about the process through which young

people come to express gendered job aspirations. Girls and boys are regularly subjected to sex-role conditioning in the family, the schools, and other early realms of life; they are constantly bombarded with messages that link "femininity" or "masculinity" to sex-appropriate work. It is therefore unsurprising that numerous studies have documented sex differences in the vocational aspirations of children, adolescents, teenagers, and young adults.²⁴⁶

This evidence alone, however, is insufficient to support the claim that workplace segregation exists because women have been socialized to prefer traditionally female jobs. Women may change their initial preferences for jobs sex-typed as "female" to jobs sex-typed as "male" as a result of their experiences at work. If young women change the sex-type of their early job preferences after they begin working and if women's initial preferences do not predict the sex-type of the jobs they perform as their careers unfold, then it is difficult to explain segregation as a function of women's pre-labor market socialization. Thus, the pre-labor market explanation depends also on a second set of assumptions that link the sex-type of women's early work aspirations to the sex-type of the work they do over the course of their careers.²⁴⁷

Recent sociological research has demonstrated the weakness of this link. In his book *Revolving Doors*, sociologist Jerry Jacobs presents the most comprehensive quantitative analyses of these issues to date.²⁴⁸ Jacobs' research presents three propositions that refute the claim that workplace segregation is attributable to women's pre-labor market preferences. First, the sex-type of the work to which young women initially aspire does not remain stable over time, but changes substantially after they start working.²⁴⁹ For the more than eighty

²⁴⁶ See Marini & Brinton, *Sex Typing in Occupational Socialization*, in *SEX SEGREGATION AND THE WORKPLACE*, *supra* note 1, at 192 (describing studies that show differences in young people's early occupational aspirations and discussing the mechanisms through which their aspirations come to be gendered).

²⁴⁷ Researchers who explain segregation as a function of pre-labor market socialization have done little to explore this link. Typically, they point to evidence showing that the level of sex segregation in young people's occupational aspirations corresponds to the level of sex segregation in the labor force. See, e.g., *id.* at 203-04 (concluding that the "overall similarity between the sex typing of occupational aspirations and attainments indicates that influences prior to labor market entry play an important role in the determination of occupational outcomes for individuals"). However, they fail to demonstrate any direct connection between the sex-type of early aspirations and the sex-type of later occupational outcomes.

²⁴⁸ See J. JACOBS, *supra* note 1.

²⁴⁹ Jacobs examined data from the National Longitudinal Survey of Young Women (NLS Young Women), a survey of a representative sample of more than 5000 women between the ages of 14 to 24 in 1968. Each year between 1968 and 1980, the women were asked to name the occupation in which they were employed that year, as well as the occupation to which they aspired at age 35. See *id.* at 10. Jacobs' analyses treat the sex-type of occupations held or aspired to as a continuous variable, with each occupation coded from 0 to 100 percent female. See *id.* at 94.

percent of young women who changed their aspirations between 1970 and 1980, the sexual composition of the occupation to which they aspired in 1970 was only very weakly associated with the sexual composition of the occupation to which they aspired ten years later.²⁵⁰ Second, the sex-type of the work to which young women initially aspire does not predict the sex-type of the work they do as their careers unfold. For the eighty percent of young women who changed occupations, the sexual composition of the occupations they said they desired in 1970 was not correlated with the sexual composition of the occupations they actually held in 1980.²⁵¹ Third, the sex-type of women's early work does not predict the type of work they do later in life. For those who changed occupations, there was no correlation between the sexual composition of the occupations in which they began and the sexual composition of the occupations in which they were employed a decade later.²⁵² Furthermore, not only young women change the sex-type of their occupations over time; older women do also.²⁵³ Mature women who move into nontraditional occupations mid-career are almost equally likely to move into them from male-dominated, female-dominated, and more sexually integrated occupations.²⁵⁴

Taken together, Jacobs' analyses provide strong evidence that workplace segregation cannot be attributed solely to women's pre-labor market preferences. Even if young women's early preferences perfectly predicted the sex-type of their first jobs, the sex-type of the occupations to which they aspire changes substantially over time. Indeed, most young women aspire to both female-dominated and male-dominated occupations at some point or another during their

²⁵⁰ For women who changed their aspirations between 1970 and 1980, less than 1% of the variance in the sex-type of the occupations to which they aspired in 1980 was explained by the sex-type of their 1970 aspirations. *See id.* at 94-96.

²⁵¹ *See id.* at 96-97.

²⁵² *See id.* at 97-98.

²⁵³ Jacobs also examined data from the NLS Survey of Mature Women, a representative sample of over 5000 women between the ages of 30 and 44 in 1967. *See id.* at 11. A majority of these women (58%) changed occupations between 1967 and 1977. *See id.* at 141 (derived from table 7.1). For those who changed occupations, there was no correlation between the sex-type of the occupations in which they were employed in 1967 and 1977. *See id.* at 140-42. Indeed, 61% of the occupation-changers changed the sex-type of their occupations. *See id.* at 141 (derived from table 7.1).

²⁵⁴ *See id.* (table 7.1). Jacob's findings are consistent with those of other studies of women's mobility patterns. *See* Corcoran, Duncan & Ponza, *Work Experience, Job Segregation, and Wages*, in *SEX SEGREGATION IN THE WORKPLACE*, *supra* note 1, at 171, 177-78 (finding that 34% of the women in the Panel Study of Income Dynamics survey changed the sex-type of their occupations between 1975 and 1979); Rosenfeld, *Job Changing and Occupational Sex Segregation: Sex and Race Comparisons*, in *SEX SEGREGATION IN THE WORKPLACE*, *supra* note 1, at 56, 63 (finding a low correlation between the sex-type of original and destination occupations for a sample of women who changed employers between 1972 and 1973).

early careers.²⁵⁵ In addition, women's early aspirations bear almost no relationship to the sex-type of the occupations they hold over time. If sex segregation were attributable to the fact that women emerged from early life experiences with stable preferences for work of a certain sex-type, we would not expect to see so many women moving between female-dominated and male-dominated occupations.

Furthermore, the fact that women in male-dominated and female-dominated employment have similar personal histories suggests that nothing in their backgrounds has led them to approach the labor market with permanent preferences for "masculine" or "feminine" work. That women employed in nontraditional occupations often began in traditionally female ones undercuts the view that nontraditional women workers are an anomalous group of women who somehow managed to escape socialization to feminine roles. To explain segregation as a function of women's early socialization, proponents of this explanation must be able to identify and account for the personal characteristics that distinguish women who work in nontraditional occupations from the majority who do not. However, researchers have been unable to identify any such demographic characteristics. Mobility studies have found that women's probability of moving across sex-typed occupational boundaries over time does not vary significantly by race, age, marital status, or parental status.²⁵⁶ These mobility studies are consistent with other studies finding that various personal, family-related characteristics — such as marital status,²⁵⁷ continuity of labor force participation,²⁵⁸ or number of children²⁵⁹ — do not predict women's likelihood of being employed

²⁵⁵ See J. JACOBS, *supra* note 1, at 103. Jacobs found that 49% of the NLS Young Women aspired to, and 44% worked in, a male-dominated occupation in some survey year between 1968 and 1980. See *id.*

²⁵⁶ See *id.* at 148–49. Jacobs also found that other independent variables — including number and ages of children, weeks employed, and hours worked per week — did not dramatically alter women's occupational mobility patterns. See *id.* at 149–50. Jacobs' findings are consistent with Rosenfeld's, who found that, for both black and white women, the likelihood of changing the sex-type of their occupations was independent of marital status and whether they had interrupted their careers to care for children. See Rosenfeld, *supra* note 254, at 72–76. Ironically, Rosenfeld found that "[t]he only effect of family responsibility . . . [was] for white men," who were less likely to move from a male-dominated to a female-dominated occupation if they were married. *Id.* at 74 (emphasis in original).

²⁵⁷ See, e.g., Beller, *Occupational Segregation by Sex: Determinants and Changes*, 17 J. HUM. RESOURCES 371, 383 (1982); England, *The Failure of Human Capital Theory To Explain Occupational Sex Segregation*, 17 J. HUM. RESOURCES 358, 367 (1982).

²⁵⁸ See, e.g., Corcoran, Duncan & Ponza, *supra* note 254, at 188; England, *supra* note 257, at 368.

²⁵⁹ See Beller, *supra* note 257, at 384–85; Daymont & Statham, *Occupational Atypicality: Changes, Causes and Consequences*, in 5 DUAL CAREERS 107 (L. Shaw ed. 1981). Indeed, Beller found that contrary to conventional predictions, the probability that a woman was nontraditionally employed actually increased slightly with her number of children. Moreover, Beller found that, even if women had been identical to men in terms of a number of personal

in a male-dominated or female-dominated occupation at any given time. These studies demonstrate that workplace segregation cannot be attributed to women's different family roles.²⁶⁰ The studies do not imply that women do not assume a greater burden for caring for families than men. Women do.²⁶¹ The studies show only that contrary to the conventional wisdom, sex segregation does not persist because women's commitment to the family leads them to "choose" to consign themselves to lower-paid, female-dominated occupations.²⁶²

If sociological evidence refutes the view that workplace segregation is a function of women's early socialization, it also challenges the theoretical account of gender implicit in that view. By positing that women have chosen traditionally female work, the pre-labor market explanation initially appears to portray women as agents actively involved in constructing their own work aspirations and identities. Instead, this explanation eliminates women's capacity for agency. To explain segregation as a function of women's own choice, one must presume that the content of early sex-role conditioning is so coherent

characteristics associated with family responsibilities (for example, marital status, number of children, number of weeks worked, part-time versus full-time status, and whether the reason for working part-time was "home specialization"), the probability that a woman would have worked in a nontraditional occupation in 1974 would have increased by only 1.1%. See Beller, *supra* note 257, at 384-85.

²⁶⁰ See J. JACOBS, *supra* note 1, at 190-91 ("[M]arital and family responsibilities simply are not powerful factors in producing mobility from male-dominated into female-dominated occupations."); Rosenfeld, *supra* note 254, at 77 ("For neither white nor black women was there much support for the idea that extent of family responsibilities influences the chance to move from or to a sex-typical occupation.").

²⁶¹ See *supra* note 231.

²⁶² The fact that women with primary family responsibilities are about as likely as women without such responsibilities to be found in, or to move to, nontraditional occupations may reflect a number of underlying phenomena. First, many nontraditional jobs probably do not pose any greater barriers to family life than do traditionally female jobs. See *supra* note 198. Indeed, portraying the jobs men do as inherently more demanding than the jobs women do is part of the ideological framework that stigmatizes women as marginal workers and justifies keeping them out of the higher-paying "men's jobs." This is part of the insight of the comparable worth movement. See Claus, *Comparable Worth — The Theory, Its Legal Foundation, and the Feasibility of Implementation*, 20 U. MICH. J.L. REF. 7 (1986). Second, to the extent that certain nontraditional jobs may make demands that are difficult for primary family caretakers, many such women are willing to undertake those demands despite the back-breaking double burden. Particularly for working-class women, the higher wages for nontraditional jobs enable them to give their children greater opportunities, such as a college education. See, e.g., M. WALSHOK, *BLUE-COLLAR WOMEN: PIONEERS ON THE MALE FRONTIER* 252 (1981). As Walshok explained:

Most of the women with children indicated they would like more time with their children, but none defined their need for employment as a hardship on children because "what could I do for my kids and husband just sitting around the house all day!" This is not to suggest the women had no problems combining work and family. They clearly did. . . . In fact, their descriptions of a typical workday showed that most were fully occupied twelve to fourteen hours a day.

Id.

and its hold on women so permanent that it predetermines what they do throughout their lives. In adopting this static view of women's work preferences, the pre-labor market explanation reduces women to little more than walking embodiments of other people's early role-expectations for them. Adult women are limited to acting out "feminine" scripts others wrote for them while they were children.

In fact, the content of early socialization is neither monolithic nor uniform. Girls receive ambiguous and inconsistent signals that encourage them in some stereotypically masculine behavior as well as stereotypically feminine behavior.²⁶³ In addition, children do not always conform to even the clearest parental expectations, but respond to parental and other messages with their own interpretations.²⁶⁴ In light of these factors, it is not surprising that women emerge from early socialization with work attitudes and preferences that are open and subject to revision. Neither life nor people are static. Even if the main thrust of women's early training is to reward them for appropriate sex-role behavior, socialization is not a straitjacket that predetermines that adult women will aspire only to work defined by the dominant culture as feminine.²⁶⁵

Christine Williams' recent study of women in the Marines confirms this point.²⁶⁶ One would be hard-pressed to think of an occupation

²⁶³ See K. GERSON, *HARD CHOICES: HOW WOMEN DECIDE ABOUT WORK, CAREER, AND MOTHERHOOD* 53-55 (1985). Gerson did a life-history analysis of a group of women between the ages of 27 and 37, with varying socioeconomic backgrounds and work histories. When asked about parental expectations while growing up, only 32% of the women responded that their parents had stressed the importance of marriage and family above all else. An almost equal proportion (27%) reported that their parents had placed greater value on education, work, and economic self-sufficiency than on marriage and parenting. Another 17% could not recall their parents expressing any strong expectations. The remaining 25% stated that they had received mixed messages: the importance of education, work and economic independence had been stressed, while marriage, motherhood, and homemaking had been assumed. See *id.* at 54.

²⁶⁴ See *id.* at 198.

²⁶⁵ Gerson confirms this theme of change and development over time. Of the women she studied, 55% stated that they had emerged from childhood with "domestic" orientations, in which they expected their primary roles to be marriage, mothering, and homemaking. The other 45% reported early "nondomestic" orientations, in which they looked with indifference or disdain on domesticity and expected to devote themselves primarily to wage work instead. See *id.* at 59-65. Both groups of women deviated substantially from their original orientations as they moved into adulthood. Of those who reported early domestic orientations, 67% changed their orientations to nondomestic ones as adults, and of those who reported nondomestic origins, 63% became domestically oriented as adults. See *id.* at 67. Furthermore, neither parental expectations nor maternal role models predicted whether the women took domestic or nondomestic paths. Of those whose parents had stressed marriage and family, only 47% were domestically oriented as adults; of those whose parents had stressed education, work, and self-sufficiency, only 62% held primarily nondomestic orientations as adults. See *id.* at 55.

²⁶⁶ See C. WILLIAMS, *GENDER DIFFERENCES AT WORK: WOMEN AND MEN IN NONTRADITIONAL OCCUPATIONS* 78-79 (1989).

our culture defines as more quintessentially masculine than the U.S. Marine Corps. Yet Williams found that women Marines were no different — no less “feminine” — than other women.²⁶⁷ Most women in the Marines “value[d] femininity and identif[ied] themselves as feminine,”²⁶⁸ but they had a complex sense of feminine identity that did not preclude them from engaging in masculine occupational pursuits. As one recruit struggled to explain: “We’re equal with the men, but you can distinguish the difference. The men do it rough, and we do it rough, but we still have the feminine within ourselves We do the same things men do, but we’re still women, 100 percent women.”²⁶⁹ For these women, femininity meant “self-confidence and self-respect — basic human qualities we tend not to associate with gender at all.”²⁷⁰

Like the quantitative studies, Williams’ research refutes the claim that only unusual women who managed to escape early conditioning to feminine sex-roles will aspire to nontraditional work. It is only within the context of their work experiences that women even come to develop stable work aspirations and identities. Mary Walshok’s *Blue-Collar Women* provides a vivid and comprehensive documentation of this process.²⁷¹ Walshok found that women employed in nontraditional blue-collar trades acquired definite work preferences and a stable work role identity only after “a number of on-the-job experiences and trial and error experiments.”²⁷² Like the nontraditional women workers studied by other researchers,²⁷³ the women in Wal-

²⁶⁷ Few women joined the Marines out of a desire to defy traditional sex roles. They joined the Marines for pragmatic reasons, most notably a desire for financial security and career advancement. They almost universally planned to combine childrearing with their military careers; many enlisted to support their children. See *id.* at 72-74.

²⁶⁸ *Id.* at 75.

²⁶⁹ *Id.* at 6. Many of the women also refused to accept the cultural construction of the military as inherently “masculine.” Some of them insisted, for example, that the Marine’s basic training in discipline and deference was no different from Catholic schoolgirls’ education. See *id.* at 141.

²⁷⁰ *Id.* at 79. If the women did not view nontraditional work as inconsistent with their womanhood, most were also disdainful of women who tried to “use” their womanhood to obtain special favors. True “femininity,” for them, lay in a sense of dignity and self-worth that was incompatible with “using the fact that you’re feminine to get out of things.” See *id.* at 77.

²⁷¹ See M. WALSHOK, *supra* note 262. Two more recent books include detailed interviews with women in nontraditional blue-collar occupations. See M. MARTIN, *HARD-HATTED WOMEN: STORIES OF STRUGGLE AND SUCCESS IN THE TRADES* (1988); J. SCHROEDEL, *ALONE IN A CROWD: WOMEN IN THE TRADES TELL THEIR STORIES* (1985).

²⁷² M. WALSHOK, *supra* note 262, at 115-16.

²⁷³ See K. DEAUX & J. ULLMAN, *supra* note 25, at 74 (reporting that of the 103 women in nontraditional jobs in the steel industry, the vast majority had previously been employed in traditionally female jobs); M. MARTIN, *supra* note 271 (revealing that of the 18 women who discussed their employment history, 14 had previously worked in female-dominated jobs); J. SCHROEDEL, *supra* note 271 (revealing that of the 25 women in nontraditional blue-collar jobs,

shok's study moved to nontraditional employment from traditionally female work.²⁷⁴ They began in female occupations "not because of a strong preference for that kind of work, but because there were no alternatives."²⁷⁵ As a consequence of limited opportunities, both the college graduates and the less educated women had erratic and unstable work histories — moving in and out of low-paying, dead-end, female-dominated jobs. These women had formed no real preference for any particular type of work before they began working in nontraditional jobs. They discovered their commitment to nontraditional work, and their identities as committed workers, only as a result of encountering opportunities that became available to them after they had been in the labor force for years. More than half the women had held no prior interest in the nontraditional trade they eventually entered or even in nontraditional work generally.²⁷⁶ Indeed, most of the women knew little or nothing about the jobs they moved into before they were trained for them.²⁷⁷

These women's experiences point up the central flaw in the pre-labor market explanation for sex segregation. As Walshok points out, the pre-labor market explanation assumes that

a certain amount of interest, planning, and preparation precede actual decisions about employment In contrast, the experiences of these women in the workplace and their exposure to opportunities seemed more crucial to the development of their vocational interests than advance planning, preparation, or reinforcement from a teacher, parent, or counselor.²⁷⁸

20 had previously held female-dominated jobs); U.S. DEP'T OF LABOR, WOMEN IN TRADITIONALLY MALE JOBS: THE EXPERIENCE OF TEN PUBLIC UTILITY COMPANIES 35-37 (1978) (revealing that of women in nontraditional jobs in utility companies, most had begun in clerical jobs).

²⁷⁴ See M. WALSHOK, *supra* note 262, at 121.

²⁷⁵ *Id.* at 120. All of the women, including college graduates, reported that their "employment opportunities [had been] limited primarily to clerical jobs, waitressing, housecleaning, and factory work." *Id.* at 121.

²⁷⁶ See *id.* at 138. As one female mechanic put it: "I never made a conscious decision to become a mechanic, y'know, for that to be my skill or my trade. I don't remember that happening. It is now. And I think this is pretty much my life's work." *Id.* at 156.

²⁷⁷ As one female aircraft production control trainee explained: "I didn't know anything about aircraft other than to see them fly. . . . I didn't know what to expect, but I knew that I would be trained." *Id.* at 136. Another female stationary engineer did not even know what her own father had done for a living until after she had decided on her own to enter his trade. See M. MARTIN, *supra* note 271 at 39. While her story may seem amusing, it is also telling. It reveals that many fathers do not pass on knowledge of their trades to daughters the way they have passed it on to their sons and nephews. Thus, informal social networks for sharing occupational knowledge and skill remain gendered, even if some courts refuse to acknowledge this truth. See, e.g., *Wilkins v. University of Houston*, 654 F.2d 388, 399-400 (5th Cir. 1981), *vacated on other grounds*, 459 U.S. 809 (1982); *supra* pp. 1813-14 (discussing *Wilkins*).

²⁷⁸ M. WALSHOK, *supra* note 262, at 132-33 (footnote omitted).

Thus, the women's work preferences and commitments evolved and stabilized only as a result of employment opportunities and experiences. Prior interests and commitments did not lead women to the jobs.²⁷⁹

At one level, these observations seem astonishingly simple. It seems obvious that socialization does not grind to a halt when young women emerge from childhood, but continues behind the office door or factory gate to influence their attitudes and aspirations as adult workers. This simple point has profound implications, however. It challenges much of what has been taken for granted about how gender is reproduced in our society. The conventional view embodied in the law portrays women's attitudes and identities as constructed exclusively in private, pre-labor market spheres. Yet, the research marshalled here suggests that women's aspirations and identities are constructed in the public world of work as well. This, in turn, has important public policy implications. As one researcher put it, early socialization is a necessary but insufficient condition to account for sex segregation at work. Keeping women in their place economically requires a lifelong system of social control that must be exercised powerfully within the workplace itself.²⁸⁰

B. The Construction of Gender in the Workplace

An emerging perspective in the sociological literature provides an alternative to the pre-labor market explanation for sex segregation in the workplace. This alternative perspective begins from the premise that people's work aspirations are shaped by their experiences in the

²⁷⁹ See *id.* at 132. Walshok suggests that the assumption that people form their work aspirations before they enter the workworld is class-biased. Since women from upper-middle-class families do not necessarily take paid employment for granted, they have the luxury of clarifying their work values and interests before they enter the labor market. Working-class women, however, must begin working early in life in whatever jobs they can get. Thus, "employment may be the first step and the primary context in which [their] values and interests become solidified. . . . [They] might discover a whole world of unanticipated interests and abilities on the job which then become the impetus for training or education at a later phase in life." *Id.* at 272.

The assumption that career development proceeds in a linear sequence with stable values and interests leading people to enter certain lines of work seems to capture the experience of professionals better than that of working-class people. Jacobs suggests, however, that this linear model may not accurately describe the experience of many middle-class women, either. In his case studies of women in medicine and law, he found that substantial numbers of women entered these professions mid-career, after beginning in female-dominated occupations. Thus, contrary to the pre-labor market perspective, women physicians and lawyers were not necessarily raised with atypical sex-role expectations. Many contested their early socialization and entered male-dominated professions when the opportunity became available. See J. JACOBS, *supra* note 1, at 155-64.

²⁸⁰ See J. JACOBS, *supra* note 1, at 48.

workworld.²⁸¹ It examines how structural features of work organizations reduce women's incentive to pursue nontraditional work and encourage them to display the very work attitudes and behavior that come to be viewed as preexisting gender attributes.²⁸²

The central insight of this perspective is that adults' work attitudes and behavior are shaped by the positions they occupy within larger structures of opportunity, rewards, and social relations in the workplace. Perhaps for this reason, this perspective has been coined "the new structuralism."²⁸³ But it should not be mistaken for deterministic theories that portray people as having no capacity for agency, for it emphasizes that people act reasonably and strategically within the constraints of their organizational positions in an effort to make the best of them.²⁸⁴ Indeed, this perspective endows people with an ongoing capacity for agency that is missing from early socialization theories. People's work aspirations and behavior are "the result of a sense-making process involving present experiencing and future projecting, rather than of psychological conditioning in which the dim past is a controlling force."²⁸⁵

This perspective sheds light on the workplace dynamics that limit women's ability to claim higher-paid nontraditional work as their own. Women's patterns of occupational movement suggest that there are powerful disincentives for women to move into and to remain in nontraditional occupations. The mobility studies show that women in higher-paying, male-dominated occupations are much less likely to remain in such occupations over time than are women in lower-paying female-dominated occupations, who are more likely to stay put.²⁸⁶

²⁸¹ As Rosabeth Moss Kanter has written:

[T]o a very large degree, organizations make their workers into who they are. Adults change to fit the system. . . . [O]rganizations often act as though it is possible to predict people's job futures from the characteristics they bring with them [to] a recruiting interview. What really happens is that predictions get made on the basis of stereotypes and current notions of who fits where in the present system; people are then "set up" in positions which make the predictions come true.

R. KANTER, *MEN AND WOMEN OF THE CORPORATION* 263 (1977).

²⁸² See *id.* at 9.

²⁸³ See P. ENGLAND & G. FARKAS, *supra* note 1, at 140. "[R]esearch [in this tradition] implies that individuals develop the psychological styles required to survive in the structural position they hold. . . . [B]ehavioral differences between groups are a product of the jobs they have been allowed to enter, rather than being exogenous to actual work experience." *Id.* at 138.

²⁸⁴ See R. KANTER, *supra* note 281, at 251-52.

²⁸⁵ *Id.* at 252.

²⁸⁶ See J. JACOBS, *supra* note 1, at 141. Overall, 70.4% of the NLS mature women who were employed in female-dominated occupations in 1967 remained in female occupations in 1977, but only 46.9% of the women who were employed in male-dominated occupations remained in male occupations a decade later. See *id.* at 141-42. This pattern reflects a disproportionate — and alarmingly high — rate of female attrition from male-dominated occupations. Of the women who left male-dominated occupations between 1967 and 1977, only 19.5% moved

Thus, just as employers appear to have begun opening the doors to nontraditional jobs to women, almost as many women have been leaving those jobs as have been entering them.²⁸⁷ To the extent that women have been given the formal opportunity to do nontraditional work, something is preventing them from realizing that opportunity.

The new structuralism perspective instructs us to look beyond formal labor market opportunity and to ask what it is about the workplace itself that disempowers women from permanently seizing that opportunity. Research in this tradition directs us toward the "culture-producing" aspects of work organizations,²⁸⁸ examining whether there is "something in the relations of employment, in work culture, the way jobs are defined and distinguished from each other, that conspires to keep women from even aspiring to [nontraditional] work."²⁸⁹ I analyze below two structural features of work organizations that discourage women from pursuing nontraditional work.²⁹⁰ These two structural features interact dynamically to construct work and workers along gendered lines — the first on the "female" side and the second on the "male" side.

to other male-dominated occupations, while 43.2% switched to female-dominated occupations and 37.4% to more sexually integrated ones. But of those who left female-dominated occupations, 45.1% moved to other female occupations and 35.3% to more sexually integrated ones, while only 19.6% switched to male-dominated occupations. See *id.* at 141.

²⁸⁷ Because the absolute number of women who began in female-dominated occupations was much greater than the number who began in male-dominated occupations, the relatively low proportion of women who shifted from female to male occupations between 1967 and 1977 caused a net increase in the overall share of women in male occupations. In other words, in absolute numbers, more women entered male-dominated occupations than left them, and, thus, the overall level of sex segregation declined slightly during the 1970's. Had there been less attrition of women from male occupations, however, the level of segregation would have declined much more dramatically. Jacobs found that this same "revolving door" pattern continued into the 1980's:

In recent years, for every 100 women in male-dominated occupations who were employed in two consecutive years, 90 remained in a male-dominated occupation, while 10 left for either a sex-neutral or female-dominated occupation. At the same time, 11 entered a male-dominated occupation from one of these other occupation groups. Thus, the revolving door sends out 10 for every 11 it lets in.

Id. at 4.

²⁸⁸ C. COCKBURN, *supra* note 14, at 167. A number of other British and Australian researchers have done theoretical and empirical work from this perspective, examining how gender both structures and is constructed within the labor process itself. See, e.g., V. BEECHY & T. PERKINS, *supra* note 14; A. GAME & R. PRINGLE, *GENDER AT WORK* (1983); Scott, *Industrialization, Gender Segregation, and Stratification Theory*, in *GENDER AND STRATIFICATION* 154 (R. Crompton & M. Mann eds. 1986).

²⁸⁹ C. COCKBURN, *supra* note 14, at 165.

²⁹⁰ By focusing on these two phenomena, I do not mean to suggest that they are the only features of the workplace that contribute to women's disempowerment. See, e.g., Roos & Reskin, *supra* note 238, at 235–60 (describing numerous institutional mechanisms that limit women's ability to enter nontraditional jobs); *supra* pp. 1811–13 (discussing how employers' recruiting strategies discourage women from aspiring to nontraditional work).

1. *The Structures of Mobility and Reward for Traditionally Female Jobs.* — It is an old insight that people who are placed in jobs that offer little opportunity for growth or upward mobility will adapt to their situations by lowering their work aspirations and turning their energies elsewhere. Decades ago, researchers documented this phenomenon among male workers.²⁹¹ Indeed, men in low-mobility positions display orientations toward work that conventional stereotypes reserve for women. They do not define work as a central life interest, but focus instead on non-work activities.²⁹² They dream of escape from their jobs and often interrupt their careers.²⁹³ They value extrinsic aspects of their jobs, including sociability with their co-workers, more than the intrinsic aspects of the work itself.²⁹⁴ They also insist that they are content not to be promoted.²⁹⁵

It was not until recently, however, that this same insight began to be applied to female workers.²⁹⁶ Within firms, jobs are highly segregated by sex.²⁹⁷ Female-dominated jobs tend to be on distinct promotional ladders that offer far less opportunity for advancement than do those for male-dominated jobs.²⁹⁸ In light of these unequal mobility structures, "[w]omen in low-mobility . . . situations develop attitudes and orientations that are sometimes said to be characteristic

²⁹¹ See, e.g., R. BLAUNER, *ALIENATION AND FREEDOM* (1964); E. CHINOY, *AUTOMOBILE WORKERS AND THE AMERICAN DREAM* (1955); T. PURCELL, *BLUE COLLAR MAN: PATTERNS OF DUAL ALLEGIANCE IN INDUSTRY* (1960); Dubin, *Industrial Workers' Worlds: A Study of the "Central Life Interests" of Industrial Workers*, 3 SOC. PROBS. 131 (1956); Guest, *Work Careers and Aspirations of Automobile Workers*, 19 AM. SOC. REV. 155 (1954); see also R. KANTER, *supra* note 281, at 140, 143, 147-48 (summarizing these and other similar studies).

²⁹² See E. CHINOY, *supra* note 291, at 114-15, 130, 132-133; Dubin, *supra* note 291, at 131, 135.

²⁹³ See E. CHINOY, *supra* note 291, at 74, 82-83, 85-86, 118-20; Guest, *supra* note 291, at 158-59, 162-63; Mayer & Goldstein, *Manual Workers as Small Businessmen*, in *BLUE COLLAR WORLD*, 537, 539-43 (A. Shostak & W. Gomberg eds. 1964).

²⁹⁴ See, e.g., Pennings, *Work-Value Systems of White-Collar Workers*, 15 ADMIN. SCI. Q. 397, 401-02 (1970); Tichy, *An Analysis of Clique Formation and Structure in Organizations*, 18 ADMIN. SCI. Q. 194, 195-96, 204-05 (1973). See generally R. MERTON, *SOCIAL THEORY AND SOCIAL STRUCTURE* 319-22, 347 (1968) (noting that in high-mobility systems, individuals compare themselves with those higher in rank in a process of "anticipatory socialization," but that in low-mobility systems, individuals compare themselves with their peers and develop group solidarity).

²⁹⁵ See E. CHINOY, *supra* note 291, at 47-50, 59-60, 62, 111-12; T. PURCELL, *supra* note 291, at 125-26, 269; Guest, *supra* note 291, at 157-59.

²⁹⁶ For a critique of earlier sociological studies analyzing men's relationship to employment on a "job model" while analyzing women's on a "gender model," see Feldberg & Glenn, *Male and Female: Job Versus Gender Models in the Sociology of Work*, 26 SOC. PROBLEMS 524 (1979).

²⁹⁷ See, e.g., Bielby & Baron, *supra* note 1, at 27, 35; Gutek & Morasch, *supra* note 1, at 61-62.

²⁹⁸ See Hartmann, *Internal Labor Markets and Gender: A Case Study of Promotion*, in *GENDER IN THE WORKPLACE* 59, 59-66 (C. Brown & J. Pechman eds. 1987) (reviewing studies documenting the existence of separate internal career ladders for men and women); Roos & Reskin, *supra* note 238, at 248-51 (same).

of those people as individuals or 'women as a group,' but that can more profitably be viewed as universal *human* responses to blocked opportunities."²⁹⁹

Kanter's study of secretaries in a major industrial corporation vividly portrays this point. The corporation recruited its secretaries from parochial high schools, attended mostly by young women who were accustomed to taking orders and who had had little opportunity to develop habits of independence and initiative. Once hired, secretaries had no opportunity to move upward in the organization. They could not switch to the managerial track. Their own ladder was short, with their formal rank derivative of their bosses': climbing to "the top" meant only snaring a boss who was higher up in the managerial hierarchy. Bosses rewarded secretaries for their attitudes instead of their skills and their loyalty instead of their talent. An analysis of their performance evaluations showed that bosses valued them most highly for "enthusiasm" and "personal service orientation." In exchange, secretaries were offered non-utilitarian, symbolic rewards — such as "praise" and "love" — rather than money or career advancement.³⁰⁰

The corporation's secretaries tended to display work attitudes and behaviors that are commonly perceived to be attributes of "femininity." Many were narrowly devoted to their individual bosses, timid and self-effacing, dependent on praise, and given to emotionality and gossip. But it was the their position within the organization and the structure of incentives attached to their jobs that led them to develop these orientations.³⁰¹ To be good secretaries, they were required to display the "feminine" behaviors that are commonly viewed as an extension of women's intrinsic personalities.³⁰²

²⁹⁹ R. KANTER, *supra* note 281, at 159 (emphasis in original); see also Laws, *Psychological Dimensions of Labor Force Participation of Women*, in EQUAL EMPLOYMENT OPPORTUNITY AND THE AT&T CASE, *supra* note 25, at 125, 141 ("When women lower their occupational aspirations, this may reflect a realistic assessment of their chances for success.").

³⁰⁰ See R. KANTER, *supra* note 281, at 69-91.

³⁰¹ See *id.* at 91-99.

³⁰² There are several ways in which employers have structured traditionally female jobs so as to require or encourage women to display behaviors that are commonly viewed as preexisting attributes of womanhood. See, e.g., V. BEECHY & T. PERKINS, *supra* note 14, at 45-76, 77-101 (showing how employers have built gender into the way they structure hours, achieving flexibility in male jobs by adding overtime to full-time jobs, but doing so in female jobs by constructing them as part-time); S. COHN, *THE PROCESS OF OCCUPATIONAL SEX-TYPING: THE FEMINIZATION OF CLERICAL LABOR IN GREAT BRITAIN* 91-115 (1985) (showing how employers have forced women to quit work when they marry as a way of lowering labor costs in certain female jobs and have legitimated such "marriage bars" by describing women as uncommitted to wage work); B. GUTK, *SEX AND THE WORKPLACE* 134-36, 142-46 (1985) (showing how employers have built sexual attractiveness into the very definition of what is required to do traditionally female jobs).

Like the blue-collar men studied by an earlier generation of sociologists, Kanter's secretaries adjusted to their realistically nonexistent possibility of advancement by rating the desirability of promotion relatively low.³⁰³ Similarly, they began to value social relations at work over the intrinsic aspects of the job itself, developing close relationships with their peers in a counterculture that valued mutual aid and loyalty over individual mobility and "success."³⁰⁴ The corporation's "folk wisdom" maintained that only women would be worried about taking a promotion because it would mean leaving their friends. But the men in low-opportunity positions exhibited the same concern.³⁰⁵ Thus, women's work aspirations and orientations are, like men's, shaped by their opportunities for mobility and the social organization of their jobs.³⁰⁶

The stories of blue-collar tradeswomen illustrate the converse effect on women's aspirations created by the opportunity to enter nontraditional jobs offering higher wages, challenge, and the chance for advancement. These women's interest and commitment to nontraditional work seemed almost fortuitous, the by-product of being lucky enough to encounter some opportunity to move into a job offering greater personal growth and rewards. However, the fact that they encountered such an opportunity was not mere happenstance, but a direct consequence of the fact that their employers felt legal pressures to hire women.³⁰⁷ Many of these women cited the significance of affirmative action in influencing them to pursue nontraditional work. For them, sex-neutral recruiting efforts would have been insufficient. It was important for them to hear that the employer was actively seeking *women* workers — not just looking for workers in general (which they would have understood to mean men). When they heard that some nontraditional job was opening up specifically for women³⁰⁸

³⁰³ Kanter found that the mean score on a measure of motivation to be promoted was lower for nonmanagerial women workers (mostly secretaries) than for nonmanagerial men. However, the men's objective prospects for promotion were also better. Indeed, the women consistently rated their promotional prospects as more desirable than likely. They believed they had no chance of escaping low-level, female-dominated jobs. See R. KANTER, *supra* note 281, at 140-42.

³⁰⁴ See *id.* at 149-52.

³⁰⁵ See *id.* at 151.

³⁰⁶ See *id.* at 159.

³⁰⁷ Many women understood that they had obtained their jobs only as a result of legal pressures. See, e.g., M. MARTIN, *supra* note 271, at 150 ("The company was pushing affirmative action, because it had a class-action suit brought against it by a group of women in the mines in 1973. I was hired four years after the suit was filed, but even then, there were only a few women working for the company."); *id.* at 71 ("The process of entering the San Francisco Police Department . . . started for me in 1973. That's when community groups got together and filed a suit to open up the job to women and minorities . . .").

³⁰⁸ As one former secretary explained: "I didn't start thinking about non-traditional work

or saw other women performing nontraditional work,³⁰⁹ or made contact with community-based programs designed specifically to attract and support women in nontraditional work,³¹⁰ many of them perceived for the first time that they could aspire to nontraditional jobs.

Once they began doing nontraditional jobs, these women became highly motivated workers who defined work as a central life interest and who valued the intrinsic aspects of their work. Although many of the women had originally moved into nontraditional work because they needed the money, the job quickly became more than a paycheck. The women in Walshok's study valued four things most highly about their work: (1) productivity, or "a feeling of having done something constructive, of having accomplished something with one's time";³¹¹ (2) challenge, or "a new or unusual experience, that requires a woman to stretch herself, to reach, to grow";³¹² (3) autonomy, or the opportunity to work independently and to exercise discretion about how to control the timing and sequencing of one's work;³¹³ and (4) relatedness, or "feeling as if one's 'in the swim of things', in the 'mainstream' of life."³¹⁴ Indeed, women may appreciate these features of nontradi-

until I heard the carpenters were looking for women. . . . But as soon as the possibility was mentioned, my imagination went with it." J. SCHROEDEL, *supra* note 271, at 35.

³⁰⁹ One woman described the transformative power of seeing women doing nontraditional work as follows:

When I came out here I fell in with some women who worked in the trades and they had some potlucks for women in the building trades and I went there and I saw all these women and I was real excited — I thought, "Oh, yeah, that's who I am, I'm like those women over there."

M. WALSHOK, *supra* note 262, at 137-38; see also *id.* at 163-64 (describing a similar transformation).

³¹⁰ As one woman who became a sailor explained:

[I]t wasn't until I moved to Seattle when I was surrounded by organizations and groups that seemed encouraging of this — just seeing flyers about workshops on women in non-traditional trades, having Mechanica available where you could learn the details about steps in joining a union. That's when it became a real possibility.

J. SCHROEDEL, *supra* note 271, at 77; see also M. WALSHOK, *supra* note 262, at 167-68 (discussing the importance of community-based programs in inspiring and helping women enter nontraditional trades); Law, *supra* note 163, at 45-46, 53-55, 72-76 (same).

³¹¹ M. WALSHOK, *supra* note 262, at 140.

³¹² *Id.* at 142.

³¹³ See *id.* at 147-48.

³¹⁴ *Id.* at 145. Other studies have reported that women in blue-collar trades value the challenge, freedom, and intrinsic rewards of the job, just as their male co-workers do. See, e.g., K. DEAUX & J. ULLMAN, *supra* note 25, at 131-33. The women speak movingly of the exhilaration that comes with challenge and freedom on the job. See, e.g., M. MARTIN, *supra* note 271, at 167-68. One female firefighter stated:

For nine days, I was part of the biggest [fire] incident I ever expect to see. . . . I've never worked as hard as I did on some of those hot afternoons, pulling those lines around in the mud and rocks. . . . Events that demand everything you can give leave you with

tional work even more than men do, because they contrast so favorably with the characteristics of female-dominated jobs available to working-class women.³¹⁵

If there is tragedy in this account of how work aspirations and behaviors come to be gendered, there is also potential for hope. If women's work orientations are attributable not to their individual "feminine" characteristics, but rather to the structures of mobility and rewards attached to jobs, then the solution is to change the work structures.³¹⁶ Classwide title VII suits challenging sex discrimination in promotion hold the promise to do just that. In alleging that women on the female job ladder are systematically being denied promotion into better jobs on the male job ladder, plaintiffs seek to restructure internal career ladders to create new paths up and out of entry-level female jobs for all women (and not just an exceptional few).³¹⁷ Courts can order remedies that will prompt employers to restructure those ladders in ways that will infuse women workers with new hopes and aspirations.³¹⁸ In doing so, they may also stimulate employers to

an unconquerable feeling of exuberance that lasts well beyond fatigue. Given the choice, there was no place in the world I would rather have been.

Id.; see also J. SCHROEDER, *supra* note 271, at 14 ("That is the greatest feeling in the world — the music, the sun, and wheeling along the freeway [in my truck]. . . . I like being on the road where you haven't got somebody looking over your shoulder, bitching all the time.").

³¹⁵ See M. WALSHOK, *supra* note 262, at xix-xx.

³¹⁶ For suggestions for how to change work structures in ways that will both reduce sex segregation and improve the quality of worklife for all workers, see C. COCKBURN, cited above in note 14, at 242-44; and R. KANTER, cited above in note 281, at 267-84.

³¹⁷ In several cases, plaintiffs have alleged that women in entry-level female jobs were systematically denied promotion or transfer into higher-paid male jobs on separate career ladders. See, e.g., *Kyriazi v. Western Elec. Co.*, 461 F. Supp. 894 (D.N.J. 1978), *aff'd on other grounds*, 647 F.2d 388 (3d Cir. 1981); *Wetzel v. Liberty Mut. Ins. Co.*, 372 F. Supp. 1146 (W.D. Pa. 1974), *aff'd*, 511 F.2d 199 (3d Cir. 1975), *vacated and remanded on other grounds*, 424 U.S. 737 (1976); see also B. BERGMANN, *supra* note 1, at 106-10 (discussing these two cases). In other cases, women employed in what we think of as nontraditional positions (such as management) have alleged that they were disproportionately denied promotion into the upper echelons or were given discriminatory work assignments that decreased their chances for promotion later. See, e.g., *Palmer v. Shultz*, 815 F.2d 84 (D.C. Cir. 1987); *Leisner v. New York Tel. Co.*, 358 F. Supp. 359 (S.D.N.Y. 1973).

³¹⁸ Although traditional goals and timetables probably provide the best incentive for employers to change practices that lead to segregation, some lower courts who have held employers liable for sex segregation have declined to impose such numerical relief. See, e.g., *Catlett v. Missouri Highway & Transp. Comm'n*, 828 F.2d 1260, 1268-69 (8th Cir. 1987), *cert. denied*, 485 U.S. 1021 (1988); *Jordan v. Wright*, 417 F. Supp. 42, 45 (M.D. Ala. 1976). Recent Supreme Court decisions permit the trial courts to use flexible long-term goals as remedies for proven patterns of discrimination, but establish relatively high standards that may make it even easier for trial courts who are so inclined to refuse to grant such relief. See *United States v. Paradise*, 480 U.S. 149, 167 (1987) (holding numerical relief permissible under the fourteenth amendment when the employer has engaged in "pervasive, systematic, and obstinate" conduct); *Local 28, Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421, 445 (1986) (holding numerical relief permissible under title VII when the employer has engaged in "persistent or egregious discrimination or when necessary to dissipate the lingering effects of pervasive discrimination").

redefine the content of entry-level jobs traditionally done by women in less stereotypically feminine terms.³¹⁹

Unfortunately, the courts all too often fail to respond, and in the process, they reproduce the very rationalizations for the two-tier system that keeps so many women in their place. When courts accept employers' arguments that women in female jobs lack interest in being promoted, they reinforce the sexist notion that there is something about womanhood itself that endows women with a penchant for low-paying, dead-end jobs. By refusing to intervene, they permit employers to continue to structure career ladders in ways that will encourage women to develop the depressed aspirations that can later be identified as "proof" that they preferred to be stuck at the bottom all along. Through their statements and their actions, these courts undercut women's ability to form and exercise the very choice they purport to defend.

2. *The Work Cultures of Traditionally Male Jobs.* — While separate-but-unequal job structures encourage women to lower their work aspirations, they also imply that segregation is natural in a way that encourages male workers to adopt proprietary attitudes toward "their" jobs. These attitudes encapsulate male-dominated jobs in a web of social relations that are hostile and alienating to women who dare to upset the "natural" order of segregation. I refer to the entire bundle of practices and processes through which these relations are created and sustained as harassment.³²⁰ Overtly sexual behavior is only the tip of a tremendous iceberg that confronts women in nontraditional jobs.³²¹ They face a wide-ranging set of behaviors and attitudes by

³¹⁹ See, e.g., G. NIELSEN, FROM SKY GIRL TO FLIGHT ATTENDANT: WOMEN AND THE MAKING OF A UNION 81-103 (1982) (describing how early title VII decisions helped redefine the flight attendant job in less patronizing, more professional terms).

³²⁰ In contrast to my definition of harassment, the legal system focuses on conduct that is explicitly "sexual" in nature. EEOC guidelines, for example, define harassment in these terms:

Unwelcome *sexual* advances, requests for *sexual* favors, and other verbal or physical conduct of a *sexual* nature . . . when (1) submission to such conduct is made explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive work environment.

EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(a) (1989) (emphasis added). Drawing on the guidelines, legal doctrine recognizes two different types of sexual harassment: (1) "quid pro quo" harassment, in which women workers are asked to grant sexual favors at the risk of forfeiting some employment benefit; and (2) "hostile environment harassment," in which conduct by supervisors or co-workers is "sufficiently severe or pervasive, to alter the conditions of [the victim's] employment and create an abusive work environment." *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 67 (1986) (quoting *Henson v. Dundee*, 682 F.2d 897, 904 (11th Cir. 1982)); see also C. MACKINNON, *supra* note 212, at 32-47 (describing these forms of harassment).

³²¹ For women in male-dominated jobs, harassment is less likely to take the form of super-

their male supervisors and co-workers that make the culture of non-traditional work hostile and alienating.³²² The following statement by a woman welder captures a sense of what is involved:

It's a form of harassment every time I pick up a sledgehammer and that prick laughs at me, you know. It's a form of harassment when the journeyman is supposed to be training me and it's real clear to me that he does not want to give me any information whatsoever. . . . It's a form of harassment when the working foreman puts me in a dangerous situation and tells me to do something in an improper way and then tells me, Oh, you can't do that! It's a form of harassment when someone takes a tool out of my hand and said, Oh, I'm going to show you . . . and he grabs the sledgehammer from my hand and proceeded to . . . show me how to do this thing . . . you know, straighten up a post . . . it's nothing to it, you just bang it and it gets straight It's a form of harassment to me when they call me honey and I have to tell them every day, don't call me that, you know, I have a name printed right on my thing. . . . Ah, you know, it's all a form of harassment to me. It's not right. They don't treat each other that way. They shouldn't treat me that way.³²³

Harassment is a structural feature of the workplace that sex segregation engenders.³²⁴ It creates a serious disincentive for women to enter and remain in nontraditional jobs. Even overtly sexual harass-

visors' demands for sexual favors and more likely to take the form of sexual taunts and other actions by co-workers that are part of a larger pattern of hostility intended to drive the women away. Foremen and supervisors usually tolerate or cooperate in the harassment. See Crull, *Searching for the Causes of Sexual Harassment: An Examination of Two Prototypes*, in HIDDEN ASPECTS OF WOMEN'S WORK, *supra* note 17, at 225, 228-30; Pollack, *Sexual Harassment: Women's Experience vs. Legal Definitions*, 13 HARV. WOMEN'S L.J. 35, 37, 50 n.51 (1990).

³²² See M. MARTIN, *supra* note 271, at 10. This broader form of harassment is so much a part of the "normal" environment of traditionally male-dominated trades that some researchers do not even attempt to measure it. Mary Walshok observed, for example, that it is "normal" for men in blue-collar trades

to question the sincerity of the woman's interest and commitment to a man's job, to wonder about whether or not the woman was going to get married and take off or get pregnant, to question whether the woman had technical or mechanical competence or the physical strength and agility to do the job, and to resent women because they perceived them as taking away a job from one of their own.

M. WALSHOK, *supra* note 262, at 211. This led Walshok to define "negative work environments" as those that go beyond this "normal" treatment to involve "actual acts of hostility or sabotage, withholding of opportunities for information and training, persistent sexual innuendos, and open harassment." *Id.* at 211-12. Even using this narrow definition, Walshok found that approximately half of the women had negative relationships with their supervisors and co-workers during their first year on the job. See *id.* at 188, 221.

³²³ *Id.* at 221-22.

³²⁴ The literature documenting the effects of skewed sex ratios on work groups makes this clear. See, e.g., B. GUTEK, *supra* note 302, at 129-52; R. KANTER, *supra* note 281, at 206-42.

ment is widespread.³²⁵ Furthermore, women in male-dominated occupations are more likely to be subjected to harassment than are women in other occupations.³²⁶ Women in female jobs understand that they will be likely to experience harassment if they attempt to cross the gender divide;³²⁷ they may conclude that the price of deviance is too high. Harassment is also driving the small number of women in nontraditional jobs away.³²⁸ Blue-collar tradeswomen report that women are leaving the trades because they cannot tolerate the hostile work cultures,³²⁹ and there are signs that this is occurring in male-dominated professions as well.³³⁰

³²⁵ This literature is now far too extensive to cite. Some of the earliest surveys documenting the existence of sexual harassment are described in C. MACKINNON, cited above in note 212, at 26-30. More recent studies include B. GUTK, cited above in note 302; U.S. MERIT SYSTEM PROTECTION BD., *SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE: IS IT A PROBLEM?* (1981); and U.S. MERIT SYSTEMS PROTECTION BD., *SEXUAL HARASSMENT IN THE FEDERAL GOVERNMENT: AN UPDATE* (1988).

³²⁶ See, e.g., Gutek & Morasch, *supra* note 1, at 67-68 (finding that women in male-dominated occupations and jobs were more likely to report harassment and to have experienced negative consequences from it than women in other work settings); Martin, *Sexual Harassment: The Link Joining Gender Stratification, Sexuality, and Women's Economic Status*, in *WOMEN: A FEMINIST PERSPECTIVE* 57, 61 (J. Freeman 4th ed. 1989) (citing studies showing that the greater the proportion of men in a work group, the more likely women were to be harassed).

³²⁷ See, e.g., O'Farrell & Harlan, 29 SOC. PROBS. 252, 259 (1982) (finding that half the women in white-collar, female-dominated occupations who considered moving into blue-collar, male-dominated occupations expected that they would be subjected to harassment if they did so).

³²⁸ See B. GUTK, *supra* note 302, at 119 ("By making insulting comments and touching women sexually, some men may try to 'make life miserable' for women in the [nontraditional] jobs, encouraging them to leave. The relatively high turnover rate among women in [these jobs] suggests that this is a successful strategy to force women out."); Gutek & Morasch, *supra* note 1, at 68 (finding that 20% of women in nontraditional work quit a job at some point because of sexual harassment, while only 9% of the larger sample did so).

This research exposes a methodological problem in most surveys attempting to measure the extent of harassment, particularly among women in male-dominated occupations. Most of the surveys are not based on longitudinal data and thus do not include women who left because of harassment. For this reason, they probably underestimate the prevalence of harassment. See J. JACOBS, *supra* note 1, at 153.

³²⁹ See, e.g., M. MARTIN, *supra* note 271, at 11; Eisenberg, *Women Hard Hats Speak Out*, *NATION*, Sept. 18, 1989, at 272-73; Pollack, *supra* note 321, at 37-38.

³³⁰ A recent newspaper article noted, for example, that a growing number of women engineers have become so discouraged by their discriminatory treatment that they are leaving engineering to pursue alternative careers. See Arundel, *Stagnation for Female Engineers*, *N.Y. Times*, Oct. 1, 1989, at F32. Other studies have documented the disproportionate attrition of women attorneys from law firms, see, e.g., Menkel-Meadow, *Exploring a Research Agenda on the Feminization of the Legal Profession: Theories of Gender and Social Change*, 14 *LAW & SOC. INQUIRY* 289, 307 (1989); Weisenhaus, *Still a Long Way To Go for Women, Minorities*, *Nat'l L.J.*, Feb. 8, 1988, at 48, and there is evidence that women leave in part because of discrimination, see, e.g., Liefland, *Career Patterns of Male and Female Lawyers*, 35 *BUFFALO L. REV.* 601, 609-11 (1986); Quade, *Myth v. Ms.: Why Women Leave the Law*, 13 *BARRISTER* 28 (1986).

One of the most debilitating forms of harassment is conduct that interferes with a woman's ability to do her job. In nontraditional blue-collar occupations, virtually all training is acquired informally on the job. Thus, a woman's ability to succeed depends on the willingness of her supervisors and co-workers to teach her the relevant skills. Yet women's stories of being denied proper training are legion.³³¹ Indeed, it is sometimes difficult to distinguish inadequate training from deliberate sabotage of women's work performance, both of which can endanger a woman's physical safety.³³² To the extent that foremen and co-workers succeed in undermining women's job performance, they convert the notion that women are not cut out for nontraditional work into a self-fulfilling prophecy.

In nontraditional white-collar occupations, male workers — including elite professionals — also guard their territory against female incursion. Their conduct, too, runs the gamut from overtly sexual behavior,³³³ to discriminatory work assignments and performance evaluations, to day-to-day personal interactions that send women the message that they are "different" and "out of place."³³⁴ The white-

³³¹ In Walshok's study, when the women were asked about the negative aspects of their job during the first year, the most frequently voiced criticism (expressed by 68% of the women) was that they felt they were being trained poorly. See M. WALSHOK, *supra* note 262, at 188.

³³² Stories like electrician Sue Eisenberg's are still far too common:

For some men, getting rid of the invaders was a personal mission. Ron, one of my first foremen, constantly warned me of the ways I might get killed in this dangerous trade: be electrocuted, have my head severed from my body, be boiled alive by steam. Without giving any instruction on how to do it safely, he told me one day to open up a 200-foot-long snake A snake is a thin piece of steel, used by electricians to pull wires through pipes. It comes tightly coiled, bound with wire ties, and if not opened carefully, will spring apart with great force. "I had a Chinese kid open one up," Ron told the crew, laughing. "He got it caught up his nose and wound up in the hospital. Quit right after that." I haven't opened up a snake since without remembering how I sweated through it that first time, while my co-workers hid.

Eisenberg, *supra* note 329, at 272. For other stories of how women have been subjected to acts by foremen or co-workers that threatened them with, or caused them, physical harm, see, for example, M. MARTIN, cited above in note 271, at 33-34 ("[The men] didn't want the women to replace them, so they pulled stunts. Someone cut the chain holding up a big motor mount I was welding. It fell down on me and burned my arm to the bone."); *id.* at 257 ("I had to start checking all the parts on my machine because Dick would loosen stuff on it, which could kill you."); and J. SCHROEDER, cited above in note 271, at 256-57 ("I went in the women's room, and I cried, because a man pushed me under a machine. . . . The men admit they think it's a man's job and a woman has no right out there.").

³³³ For example, one of Atlanta's most prestigious corporate law firms, King & Spalding, planned to hold a "wet T-shirt" contest featuring its female summer associates, even while the firm faced a sex discrimination lawsuit in the Supreme Court. See Burleigh & Goldberg, *Breaking the Silence: Sexual Harassment in Law Firms*, A.B.A. J., Aug. 1989, at 46. (The lawsuit was *Hishon v. King & Spalding*, 467 U.S. 69 (1984).) After complaints, the firm decided to hold a swimsuit competition instead. One of the firm's partners later told the *Wall Street Journal* that the "winner" of the competition had been offered a job upon graduation, remarking: "She has the body we'd like to see more of." Burleigh & Goldberg, *supra*, at 46.

³³⁴ In one recent case, for example, the lone female resident in a general surgery program

collar equivalent of work sabotage may lie in evaluating women's work by differential and sexist standards, a practice which occurs even within the upper echelons of professional life.³³⁵

Whatever men's motivations or sources of insecurity,³³⁶ harassment is a central process through which the image of nontraditional work as "masculine" is sustained. If there are no women in the job, then the work's content can be described exclusively in terms of the "manly" personal characteristics of the men who do it. On the other hand, if women can do the work, it becomes far more difficult to define the job with reference to stereotypically masculine images.³³⁷ As one female pipefitter observed:

For a long time I wasn't allowed to do certain types of jobs. . . . Some of the men would take the tools out of my hands. You see it is just very hard for them to work with me because they're really into proving their masculinity and being tough. And when a woman comes

was forced to endure sexual advances and touching; sexually explicit drawings of her body and other pornography in public meeting rooms; her supervisors' refusal to talk to her, permit her to operate, or assign her work tasks; discriminatory standards for evaluating her performance; sabotage of her work, including falsification of medical records to make it appear as though she and another female resident had made an error, *see* *Lipsett v. University of Puerto Rico*, 864 F.2d 881, 886-94 (1st Cir. 1988), and "a constant verbal attack, one which challenged their capacity as women to be surgeons, and questioned the legitimacy of their being in the Program at all," *id.* at 905.

³³⁵ *See, e.g., Price Waterhouse v. Hopkins*, 109 S. Ct. 1775 (1989). Ann Hopkins brought suit against Price Waterhouse, perhaps the nation's most prestigious public accounting firm, claiming that she was discriminatorily denied partnership. Among other outstanding achievements, she had helped secure a multimillion dollar contract with the Department of State, an accomplishment that none of the other candidates for partnership that year had matched. *See id.* at 1782. But, when it came time to consider her for partnership, her colleagues evaluated her by criteria by which no man would be judged:

One partner described her as "macho" . . . ; another suggested that she "overcompensated for being a woman" . . . ; a third advised her to take "a course at charm school" Several partners criticized her use of profanity. . . . [Another advised her to] "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."

Id. (citations omitted).

³³⁶ Some researchers emphasize that men are motivated by economic incentives, because they feel that their job security and high wages are threatened by the presence of women. *See, e.g., R. MILKMAN, supra* note 148, at 7-8, 158. Other writers have stressed patriarchal motives, arguing that traditional sex roles "spill over" into the workplace. *See, e.g., B. GUTER, supra* note 302, at 149-51.

³³⁷ *See V. BEECHY & T. PERKINS, supra* note 14, at 102-19; C. WILLIAMS, *supra* note 266, at 88-130. These studies show how the cultural constructions of the same job vary depending upon whether men or women do it. For example, one machine tools company that employed only men as crane operators explained that women did not want to drive cranes because "that was hot, heavy, dirty work and women didn't do that sort of work." V. BEECHY & T. PERKINS, *supra* note 14, at 105. But another such company that employed women defined the job in feminine terms, and suggested that women were actually better crane operators because they had a "sensitive touch" learned through knitting. *See id.* at 106.

on a job that can work, get something done as fast and efficiently, as well, as they can, it really affects them. Somehow if a woman can do it, it ain't that masculine, not that tough.³³⁸

By driving women out of nontraditional jobs, harassment reinforces the idea that women are inferior workers who cannot meet the demands of a "man's job." More subtly, for women who stay in nontraditional jobs, harassment exaggerates gender differences to remind them that they are women who are "out of place" in a man's workworld. By labeling the women as "freaks" or "deviants,"³³⁹ and simultaneously pressuring them to conform to the dominant culture,³⁴⁰ men mediate the contradiction posed by the presence of women doing "masculine" work. Thus, harassing behavior that marks nontraditionally employed women workers as exceptions for their gender — yet still *women* and therefore never quite as competent or as committed as the men — enables men to continue to define their work (and themselves) in masculine terms.

Cynthia Cockburn's study of engineers illustrates this process.³⁴¹ By defining women as inherently incapable of possessing technological competence, the men appropriated engineering as a masculine preserve. They viewed the relationship between manhood and technology in essentialist terms, as a natural affinity between "man" and "machine."³⁴² "In contrast to the way the men [perceived] themselves — as striving, achieving, engaging in the public sphere of work — they

³³⁸ J. SCHROEDEL, *supra* note 271, at 20–21; see also C. WILLIAMS, *supra* note 266, at 61 (noting that the Marine Corps segregates basic training because "[r]egardless of whether training standards are compromised in fact, the sight of women mastering the feats of basic training makes it appear that the training is not rigorous enough").

³³⁹ One of the tactics men use to make nontraditional women workers feel deviant is "lesbian-baiting." See M. MARTIN, *supra* note 271, at 14. Lesbian-baiting is only one extreme example, however, of behavior intended to divide and alienate women. See Pollack, *supra* note 321, at 78 & n.178.

³⁴⁰ Kanter discusses how male workers subject token women to "loyalty tests," in which the women are required to affirm their loyalty to the dominant culture by turning against other women. Pressuring women to tolerate sexist jokes and comments are examples. See R. KANTER, *supra* note 281, at 227–29. Racist jokes and comments are often used in the same manner. The invitation to participate in racist "humor" is one of the ways white women are often "welcomed into the club." M. MARTIN, *supra* note 271, at 13. The pervasive racism of many nontraditional blue-collar environments makes them particularly difficult for women of color, who often encounter a virulent combination of sexual and racial stereotyping. For some of their stories, see *id.*, at 71–80, 118–21, 150–55, 187–92; and J. SCHROEDEL, cited above in note 271, at 99–139. One of the most shocking stories is police officer Rose Melendez's. One night her partner drove her to a secluded area and stopped the patrol car. When Melendez asked why they were stopping, he said he wanted to shoot rats. He then opened his shirt, pulled out a handgun, and pointed it directly at her, saying, "I just want to see how fast you women cops can run." M. MARTIN, *supra* note 271, at 74.

³⁴¹ See C. COCKBURN, *supra* note 14.

³⁴² *Id.* at 172.

[viewed] women as static, domestic, private people, as nonworkers."³⁴³ They defined women as "aspect[s] of the decor" who "create a pleasant atmosphere,"³⁴⁴ as interested in and good at "boring and repetitive tasks,"³⁴⁵ and as soft, weak creatures who "'couldn't do' the *manhandling*" required to master technology.³⁴⁶ They exceptionalized the few women engineers as "performing seals," who must have been "train[ed] . . . up a bit" by some man behind the scene.³⁴⁷ They also created an occupational culture that was built around "sexual stories, references and innuendo that are directly objectifying and exploitative of women."³⁴⁸ By creating such a hostile work culture, the men ensured that few women would try to invade their jobs. They could then point to the absence of women as evidence that these jobs demand "masculine" skills and abilities not possessed by women.³⁴⁹

This analysis of the relationship between harassment and the "masculinity" of nontraditional work makes clear why many women are reluctant to apply for such work. Women understand that behind the symbolism of masculinized job descriptions lies a very real force: the power of men to harass, belittle, ostracize, dismiss, marginalize, discard, and just plain hurt them as workers. The legal system does not adequately protect women from this harassment and abuse.³⁵⁰ Courts have erected roadblocks to recovery, abandoning women to cope with hostile work environments on their own. The general attitude of the legal system seems to mirror that held by many male workers and

³⁴³ *Id.* at 185.

³⁴⁴ *Id.*

³⁴⁵ *Id.* at 186.

³⁴⁶ *Id.* at 101 (emphasis in original).

³⁴⁷ *Id.* at 188.

³⁴⁸ *Id.* at 176.

³⁴⁹ The contradictions within the men's ideological justifications are exposed as the men's careers unfold. Early in their careers, when they do hands-on machine work, male engineers defend the masculinity of their jobs in terms of a hard/soft dichotomy that defines "hard," physical work as masculine and "soft," intellectual work as feminine. In middle age, however, many of these same engineers must move on to managerial desk jobs that they once denigrated as unmanly. *Id.* at 195. They then adopt an intellectual/non-intellectual dichotomy that, ironically, associates masculinity with the intellectual and femininity with the physical. See *id.* at 196-97.

³⁵⁰ It remains unclear, for example, whether hostile but not sexually explicit behavior of the type so often encountered by nontraditional women workers even falls within the scope of sexual harassment prohibited by title VII. Compare *McKinney v. Dole*, 765 F.2d 1129, 1138 (D.C. Cir. 1985) (holding that acts that are hostile but not sexually explicit may constitute sexual harassment prohibited by title VII) with *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611, 619 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987) (implicitly refusing to recognize hostile conduct as harassment when it is not explicitly sexual in nature). For discussions of this issue, see Austin, *Employer Abuse, Worker Resistance, and the Tort of Intentional Infliction of Emotional Distress*, 41 STAN. L. REV. 1, 12-13 (1988); and Pollack, cited above in note 321, at 75 & n.164.

managers.³⁵¹ if women want to venture into a man's workworld, they must take it as they find it.³⁵²

The legal system thus places women workers in a Catch-22 situation. Women are disempowered from pursuing or staying in higher-paid nontraditional jobs because of the hostile work cultures. The only real hope for making those work cultures more hospitable to women lies in dramatically increasing the proportion of women in those jobs. Eliminating those imbalances is, of course, what title VII lawsuits challenging segregation promise. But when women workers bring these suits, too often the courts tell them that they are under-represented in nontraditional jobs not because the work culture is threatening or alienating, but rather because their own internalized sense of "femininity" has led them to avoid those jobs.

And so the cycle continues. A few women continue to move in and out the "revolving door," with little being done to stop them from being shoved back out almost as soon as they enter. The majority of working women stand by as silent witnesses, their failure to enter used to confirm that they "chose" all along to remain on the outside. There is no need for a sign on the door. Women understand that they enter at their own risk.

VI. CONCLUSION: THE IMPLICATIONS OF THE NEW ACCOUNT FOR THE LAW

The new account of the dynamics of gender and work brings us back full circle to where we began: to the role of interpretation in creating meaning and power. Judicial interpretations of sex segregation at work simultaneously flow from and feed back into a larger

³⁵¹ See, e.g., Collins & Blodgett, *Sexual Harassment . . . Some See It . . . Some Won't*, 59 HARV. BUS. REV. 76, 90 (1981) (noting that a majority of managers responding to a survey said that women employees should be able to handle on their own whatever sexual harassment comes their way).

³⁵² The clearest expression of this attitude appears in the Sixth Circuit's opinion in *Rabidue v. Osceola Refining Co.*, 805 F.2d 611 (6th Cir. 1986), cert. denied, 481 U.S. 1041 (1987). The plaintiff was the only woman with managerial responsibilities over male employees in a refining company. Despite the fact that the work environment was extremely hostile and degrading to women, the court held that it was not so offensive as to have interfered with the work performance, or to have affected seriously the "psychological well-being of a reasonable person." *Id.* at 620. To support this holding, the majority quoted favorably from the following passage from the district court's opinion:

[I]t cannot seriously be disputed that in some work environments, humor and language are rough hewn and vulgar. Sexual jokes, sexual conversations and girlie magazines may abound. Title VII was not meant to — or can — change this. . . . Title VII is the federal court mainstay in the struggle for equal employment opportunity for the female workers of America. But . . . Title VII was [not] designed to bring about a magical transformation in the social mores of American workers.

Id. at 620–21 (quoting *Osceola v. Rabidue*, 584 F. Supp. 419, 430 (E.D. Mich. 1984)).

stream of cultural understandings and practices. This dynamic interplay occurs in and through both the liability and the remedial phases of the legal process. In cases raising the lack of interest argument, legal liability turns on the court's factual determination of whether women are as "interested" as men in higher-paying, nontraditional jobs. If the answer to this question is yes, segregation is attributed to discrimination and the employer is held liable. If the answer to this question is no, segregation is attributed to women's preferences and the employer is absolved of responsibility.

Because the evidence does not and cannot reveal a verifiable answer to this question, however, judges are inevitably confronted with the problem of interpretation. To characterize women's job preferences and sex segregation itself, judges must draw from larger cultural assumptions — larger pictures of "reality" — about gender and work and their interrelation. Once cast, however, the interpretations expressed in judges' findings of fact affect the very reality they purport to describe. Whether or not they impose liability, judicial decisions are a source of interpretive authority that influence the terms in which sex segregation on the job will be perceived, and bargained over, in the future. Furthermore, courts have the institutional authority to back up their decisions with remedies that have the potential to make their interpretations of sex segregation come true.

By portraying women as naturally "feminine" creatures who approach the workworld with preordained preferences for suitably "feminine" work, courts validate sexist views of women as inauthentic workers fit only for the lowest-paying, least-challenging jobs. By portraying work itself as naturally "masculine" or "feminine," they legitimate the structures and processes through which employers construct work and work aspirations in gendered terms. By refusing to intervene, they permit and encourage employers to continue to organize work and work relations in ways that disempower women workers from claiming the more highly valued nontraditional jobs the law has promised them. Courts who interpret sex segregation as women's own choice thus negate the very choice they purport to defend.

I have elaborated a new account of the dynamics of job segregation in the hope of challenging — but also offering something positive to replace — the images of women and work that inform this fatalistic choice explanation. The new account is drawn from the findings of a number of large-scale empirical studies of women workers. It is a more accurate explanation for the reality of job segregation — a truer story about women and work — than the stock of cultural images judges have used to ground their interpretations in the past.

The central insight of the new account is that working women do not bring with them to the workworld fixed preferences for traditionally female or traditionally male work. Rather, the workplace is a central site of development for women's aspirations and identities as

workers. In a very real sense, employers create women's job preferences. Once judges realize that women's preferences are unstable and always potentially in transition depending on work conditions, it will no longer do to imagine that women have a static set of "true" preferences independent of employer action that courts can discover as a factual matter and use to ground legal decisionmaking. Indeed, the notion that women have stable preferences for traditional or nontraditional work becomes a legal fiction that is plausible only by accepting as given the very structural features of the workplace that women seek to challenge through the lawsuit.

The new account of gender and work thus exposes the myths underlying the conservative "choice" explanation. What is more, it does so in a way that moves beyond, and holds more transformative potential than, the existing liberal alternative. The new account has three implications for legal analysis that, taken together, transform the current judicial framework for interpreting sex segregation.

First, the new account frees courts to reject the conservative "choice" explanation without resorting to the liberal suppression of gender difference. Once judges acknowledge that women's early work preferences remain tentative and temporary, they need not deny the force of gender in social life to hold employers responsible for sex segregation in their workforces. Courts may acknowledge that our society pressures girls to conform to appropriately "feminine" roles, that it is women who assume the lion's share of the load of caring for families, and even that it is important to most women to think of themselves as "feminine," for none of these observations imply that women will aspire only to the lower-paying, dead-end jobs considered appropriate for their sex. To put it more positively, courts may acknowledge that women have a distinctive history, culture and identity, without concluding as a corollary that they are marginal workers content to do only unremunerative, unchallenging jobs. The new account thus frees courts to portray "women" and "workers" as involving no contradiction in terms.

Second, the new account demands deeper judicial scrutiny of the way employers have structured their workplaces. Once the assumption that women approach the labor market with fixed job preferences is abandoned, it will no longer do to conceptualize discrimination in terms of whether the employer has erected specific "barriers" that prevent individual women from exercising their preexisting preferences. Employers do not simply erect "barriers" to already formed preferences: they create the workplace structures and relations out of which those preferences arise in the first place. Thus, in resolving the lack of interest argument, courts must look beyond whether the employer has provided women the formal opportunity to enter nontraditional jobs. Judges should be skeptical about employers' claims to have made efforts to attract women to nontraditional work. Such

efforts are likely to be ineffective unless they enlist the participation of community organizations that serve working women and employ creative strategies to describe the work in terms that will appeal to women. Moreover, even extensive recruiting efforts will fail if the firm manages only to convey an all too accurate picture of organizational life that serves more as a warning than a welcome to women. Through its hiring criteria, training programs, performance evaluation standards, mobility and reward structures, response to harassment, and its managers' and male workers' day-to-day attitudes and actions, the firm may have created an organizational culture that debilitates most women from aspiring to nontraditional jobs. These sorts of work cultures can be changed, but only if courts recognize that the firm's practices create a disempowering culture for women.

A demand for closer judicial scrutiny runs counter to strong ideological currents that have begun to guide judicial action. In recent years, the courts have shown less willingness to scrutinize, and to prompt employers to restructure, practices that harm historically disadvantaged workers. Across all areas of employment discrimination law, courts increasingly tend to condemn such reconstructive aims as undue interference with business prerogatives that lies outside the scope of proper judicial authority. In cases raising the lack of interest argument, however, courts have justified their failure to scrutinize employers' practices by attributing job aspirations and job segregation to private ordering that occurs in realms beyond the public control of employers or of the law. The new account of gender and work makes clear that such a justification is insufficient.

Indeed, the third and most fundamental implication of the new account is that the judicial system is itself inevitably implicated in creating women's work preferences. Once we understand that women form their job preferences in response to employers' practices, it becomes clear that courts participate in shaping women's work aspirations all the time. Preference shaping is an unavoidable part of the job judges do when they decide title VII cases challenging workplace segregation. Every time a plaintiff brings such a case, the legal system is confronted with a decision whether to affirm or alter the status quo. When courts accept the lack of interest argument, they permit employers to organize their workplaces in ways that disable women from forming an interest in nontraditional work. When courts impose liability instead, they prompt employers to restructure their workplaces in ways that empower women to aspire to nontraditional jobs. Judicial decisions that reject the lack of interest argument also create a climate in which it is more likely that employers not involved in litigation will undertake genuine affirmative action through creative efforts to dismantle old patterns of sexual hierarchy. That such efforts can alter women's aspirations is clear from the reports of nontraditional women workers. Thus, judges' decisions are embedded in the

fabric of organizational life through which women's hopes and dreams as workers are woven.

The new account of gender and work thus reminds judges that they, too, are the authors of women's work aspirations. This awareness should bring a new sensitivity to the way judges exercise their responsibility to resolve the factual determination of whether women lack interest in nontraditional jobs. If this is a daunting responsibility, it is one that courts have been assuming since the earliest days of title VII enforcement. Courts can acknowledge their own constitutive power and use it to help create a workworld in which the majority of working women are empowered to choose the more highly rewarded work that title VII has long been promising them. To create that world, they must refuse to proclaim that women already have that choice.